

FINAL STATEMENT OF REASONS

UPDATE OF INITIAL STATEMENT OF REASONS

The Department of Fair Employment and Housing (DFEH or Department) incorporates by reference, as if set forth in full herein, the specific purpose and reasonable necessity identified for each proposed regulation in its Initial Statement of Reasons. In this update, the Department elaborates on the reasonable necessity for each regulation and identifies modifications to the originally proposed text.

The Department has been operating since its inception without regulations, although it has developed procedures of general application (DFEH Directives) for processing complaints. Many of the Department's procedures of general application fall outside any express statutory exemption to the rulemaking requirements of the Administrative Procedure Act (APA) (Government Code section 11340, et seq.) and APA Regulations (Code of Regulations, title 1, sections 1-280). The Department underscores that its proposed procedural regulations are necessary to enable the Department to streamline its processes and to comply with the APA.

All modifications made to the originally proposed text addressed below are sufficiently related to the original text so that the public was adequately placed on notice that these changes could result, as required by Government Code section 11346.8(c). In addition, all changes made after the 15-day public comment are period nonsubstantial.

Section 10000. Statement of Purpose: This proposed regulation is necessary because it identifies the purpose of the Department's procedural regulations that follow and clarifies that, along with the applicable provisions of the Fair Employment and Housing Act (FEHA) itself, it is the Department's procedural regulations (as opposed to the Directives they replace) that comprise the rules governing all proceedings before the Department. The text originally noticed to the public was modified prior to the 15-day public comment period for clarity, to improve grammar, and to correctly identify the chapter of the Government Code in which the statutes these regulations interpret are located.

Section 10001. Definitions: This regulation is necessary because it defines terms used throughout the Department's procedural regulations that either are not commonly used outside the context of a DFEH proceeding or have a different meaning or meanings when used outside this context. The text originally noticed to the public was modified prior to the 15-day public comment period to clarify or, in some instances, eliminate, definitions in response to public comment.

Section 10001(a)—Accusation: This section is necessary because it provides the meaning of "accusation" within the context of a DFEH proceeding,

which is different than the commonly understood meaning of “accusation.” A minor modification was made to this section before the 15-day comment period to capitalize “Section.”

Section 10001(b)—Authorized signature: This section identifies the individuals whose signature the Department will accept for filing a DFEH complaint on behalf of a complainant. It is necessary because it includes individuals whom one might not suspect have the authority to sign a DFEH complaint on behalf of another (such as the parent, child, or sibling with an interest in the estate of a deceased complainant, or any person whom the complainant has identified in writing as a person authorized to sign a complaint).

Section 10001(c)—Commission: The definition of “Commission” was originally noticed to the public, but was deleted prior to the 15-day public comment period. In the modified text noticed to the public, section 10001(c) now defines “complainant.”

Section 10001(d) [now Section 10001(c)]—Complainant: This section is necessary because it provides the meaning of a word the Department uses throughout the proposed regulations, which is not familiar to the public at large. The text originally noticed to the public was modified prior to the 15-day public comment period to incorporate the definition of “person” found at Government Code section 12925(d), to further clarify the meaning of “complainant” within the context of a DFEH proceeding.

Section 10001(e) [now Section 10001(d)]—Complaint: This section is necessary because it provides the meaning of “complaint” within the context of a DFEH proceeding, which is different than the commonly understood meaning of “complaint.” The text originally noticed to the public was modified prior to the 15-day public comment period to further clarify the meaning of “complaint” within the context of a DFEH proceeding.

Section 10001(f) [now Section 10001(e)]—Conciliation: This section is necessary because it provides the meaning of a word used throughout the proposed regulations, which is not familiar to the public at large or, if familiar, has a different meaning. The text originally noticed to the public was modified prior to the 15-day public comment period to strike out “mediation” and clarify that “conciliation” is offered by the DFEH’s Enforcement Division.

Section 10001(g)—Continuing Violation: The definition of “continuing violation” was originally noticed to the public, but was deleted prior to the 15-day public comment period. In the modified text noticed to the public, section 10001(g) now defines “departmental appeal.”

Section 10001(h)—Co-respondent: The definition of “co-respondent” was originally noticed to the public, but was deleted prior to the 15-day public

comment period. In the modified text noticed to the public, section 10001(h) now defines “director.”

Section 10001(i) [now Section 10001(f)]–Department: This section is necessary because it clarifies that, when used throughout the proposed regulations, “department” means the Department of Fair Employment and Housing, as opposed to another state department. The text originally noticed to the public was modified prior to the 15-day public comment period to clarify that “DFEH” also means Department of Fair Employment and Housing, which may be used interchangeably with “department” throughout the proposed regulations.

Section 10001(j) [now Section 10001(g)]–Departmental Appeal: This section is necessary because it gives meaning to the term “departmental appeal” within the context of a DFEH proceeding. The text originally noticed to the public was modified prior to the 15-day public comment period to make a semantic change.

Section 10001(k) [now Section 10001(h)]–Director: This section is necessary because it clarifies that, when used throughout the proposed regulations, “director” means the director of the Department of Fair Employment and Housing, as opposed to the director of another state department, and includes those delegated any function, power or duty of the DFEH director.

Section 10001(l) [now Section 10001(i)]–District or Regional Administrator: Inclusion of these definitions in the Department’s proposed regulations is necessary to identify the scope of authority and duties of these DFEH employees, who are referred to throughout the proposed regulations. The text originally noticed to the public was modified prior to the 15-day public comment period to further clarify the meaning of these terms and to define “regional administrator” in a separate subsection.

Section 10001(m)–District Office: The definition of “district office” was originally noticed to the public, but was deleted prior to the 15-day public comment period. In the modified text noticed to the public, section 10001(m) now defines “HUD.”

Section 10001(n) [now Section 10001(l)]–File or To File: This section is necessary because it defines how the act of filing a complaint with the DFEH is accomplished, which may differ from the commonly understood meaning of “to file.” The text originally noticed to the public was modified prior to the 15-day public comment period to make a distinction regarding complaints filed online.

Section 10001(o)–Housing Accommodation: The definition of “housing accommodation” was originally noticed to the public, but was deleted prior to the 15-day public comment period. In the modified text noticed to the public, section 10001(o) now defines “Mediation Division.”

Section 10001(p)–Protected Activity: The definition of “protected activity” was originally noticed to the public, but was deleted prior to the 15-day public comment period. In the modified text noticed to the public, section 10001(p) now defines “Pre-determination.”

Section 10001(q)–Protected Basis: This section is necessary because it provides the technical meaning of a “short-hand” term used throughout the Department’s proposed regulations to refer to all the characteristics listed, or found by courts to be covered, under laws the DFEH enforces that prohibit discrimination. The text originally noticed to the public was modified prior to the 15-day public comment period to add the Civil Code citations for the Unruh Civil Rights Act and Ralph Civil Rights Act.

Section 10001(r) [now Section 10001(s)]–Registered Complaint: This section is necessary because it provides the meaning of a technical term whose meaning may differ outside the context of a DFEH proceeding.

Section 10001(s) [now Section 10001(t)]–Respondent: This definition is necessary because it provides the meaning of a term used throughout the department’s proposed regulations, which has a different meaning outside the context of a DFEH proceeding. The text originally noticed to the public was modified prior to the 15-day public comment period to change “individual” to “person” and “law” to “statute.”

Section 10001 was further modified prior to the 15-day public comment period to add the following definitions:

Section 10001(j)–EEOC: This definition, which was added in response to a written comment, is necessary to inform those members of the public who are unfamiliar with the full name of the DFEH’s federal counterpart for employment discrimination complaints.

Section 10001(k)–Enforcement Division: This definition is necessary because the term “Enforcement Division,” which is used throughout the proposed regulations, and its meaning within the context of a DFEH proceeding, are not familiar to the public at large.

Section 10001(m)–HUD: This definition, which was added in response to a written comment, is necessary to inform those members of the public who are unfamiliar with the full name of the DFEH’s federal counterpart for housing discrimination complaints.

Section 10001(n)–Legal Division: This definition is necessary to define the unique duties of the DFEH’s Legal Division, which are referred to throughout the proposed regulations.

Section 10001(o)—Mediation Division: This definition is necessary to define the role of a new division of the Department, referred to throughout the text of the proposed regulations, with which the public may be unfamiliar.

Section 10001(p)—Pre-determination: This definition, which was added in response to a written comment, is necessary to provide the meaning of “pre-determination” within the context of a DFEH proceeding.

Section 10001(r)—Regional Administrator: Inclusion of this definition in the Department’s proposed regulations is necessary to identify the scope of authority and duties of DFEH employees who hold this position, who are referred to throughout the proposed regulations.

Section 10001(u)—Verified complaint: This definition was added in response to a written comment to provide the meaning within the context of a DFEH proceedings of “verified complaint,” a term used in the FEHA and the Department’s proposed procedural regulations. As a result of a comment received during the 15-day comment period a nonsubstantial change was made; this definition was revised for clarity to track the language of Code of Civil Procedure section 446.

Section 10002. Filing a Complaint of Employment Discrimination with the Department: This regulation is necessary because it implements Government Code section 12960(b) and clarifies and makes specific the “particulars” mentioned in section 12960(b) that must be included in a complaint of employment discrimination filed with the Department. The regulation further is necessary because it specifies the “other information” mentioned in the statute, which the Department requires a complainant of employment discrimination include.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) change “individual” to “person” at subsection (a);
- (2) strike “or characteristic” at subsection (a)(5);
- (3) clarify the statement required to verify a DFEH complaint at subsection (a)(7);
- (4) add “unless the complaint is filed electronically” at subsection (a)(8);
- (5) articulate what is required to verify a complaint filed online at newly added subsection (a)(9);
- (6) change “section” to “Section” at subsection (b);
- (7) change “district office” to “DFEH office” and “limitation” to “limitations” and add “private carrier mail (e.g., FedEx),” at subsection (c); and
- (8) change “filed” online to “submitted” online at subsection (d).

Section 10003. Liberal Construction of Complaints: This regulation is necessary because it implements, clarifies and makes specific how sections

12920, 12921(a), and 12993(a) of the Government Code apply to the manner in which the Department construes complaints of employment discrimination filed pursuant to Government Code section 12960. Section 12960 itself is silent on the broad manner in which the Department must construe complaints.

The text originally noticed to the public was modified prior to the 15-day public comment period to make semantic changes and to clarify that liberal construction applies equally to harassment complaints filed with the Department pursuant to Government Code section 12960.

Section 10004. Categories of Employment Discrimination Complaints Accepted by the Department for Filing: This regulation is necessary because it implements, clarifies and makes specific section 12960 of the Government Code by articulating that there are three categories of employment discrimination complaints the Department accepts for filing under section 12960: (1) complaints filed for investigation; (2) complaints taken for filing purposes only, which are not investigated; and (3) complaints filed to request an immediate right-to-sue. These categories of employment discrimination complaints are not identified in the statute.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to strike “co-respondent,” change “individual” to “person,” and make semantic and grammatical changes at subsection (a).

Section 10005. Obtaining a Right-to-Sue Notice from the Department: This regulation is necessary because it clarifies that a right-to-sue in an employment discrimination complaint, provided for by Government Code section 12965(b), may be obtained from the DFEH without the Department initiating an investigation. The proposed regulation is further necessary because it articulates the specific procedures for requesting an immediate right-to-sue from the Department under section 12965(b), which are not articulated in the statute.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) change “individual” to “person” at subsection (a);
- (2) change “automatic right to sue” to “immediate right to sue” and “field office” to “satellite office” at subsection (c); and
- (3) “Department” to “department” at subsection (d).

Section 10006. Filing a Complaint with the Department Alleging a Violation of the Unruh Civil Rights Act, Ralph Civil Rights Act, or Disabled Persons Act: This regulation is necessary because it implements, interprets, and makes specific Government Code section 12930(f)(2) by articulating the Department’s procedures applicable to Civil Code sections 51, 51.7 and 54 complaints that do not allege housing discrimination. This regulation further is necessary because it clarifies that the Department does not issue a right-to-sue

notice for complaints alleging a violation of Civil Code sections 51, 51.7 and/or 54, a point that is not made clear in the statute. Nor is it clear from the statute which Department procedures apply to these complaints when they do not allege housing discrimination.

The text originally noticed to the public was modified prior to the 15-day public comment period for clarity and to delete subsection (c), which was duplicative of the statutory provisions at Government Code section 12960(d)(3) and (d)(4).

As a result of a comment received during the 15-day public comment period, subsection (a) was further revised to clarify that a violation of Civil Code section 51 also is known as a denial of service.

Section 10007. Intake: This regulation is necessary because it implements sections 12930(f) and 12960(b) and (d) of the Government Code by articulating the Department's intake procedures for employment discrimination complaints. Intake procedures are not articulated in the FEHA.

The text originally noticed to the public was modified prior to the 15-day public comment period to:

- (1) change "individual" to "person" in each subsection where individual appears;
- (2) change "where appropriate" to "where it appears that the department may have jurisdiction" at subsection (a);
- (3) add the DFEH contact center e-mail address at subsections (b) and (c);
- (4) change "shall" to "may" at subsections (c) and (f);
- (5) change "district" office to "DFEH" or "department" office and add "regional administrator" at subsection (c);
- (6) strike "or characteristic" at subsection (e)(5);
- (7) change "salary" to "rate of pay" at subsection (e)(11);
- (8) change "verbally" to "orally" at subsection (e)(11)(F)(b);
- (9) add "[w]here there is doubt about whether the statute of limitations has run, the complaint shall be taken by the department and the issue of timeliness investigated and analyzed during the investigation" at subsection (i)(2);
- (10) strike "co-respondent" at subsection (i)(3);
- (11) change "jurisdictional" to "over which [another state agency] may have jurisdiction" at subsection (j); and
- (12) several nonsubstantive semantic changes and/or changes to correct grammar or capitalization also were made.

Section 10008. Priority Intake: This regulation is necessary because it further implements sections 12930(f) and 12960(b) and (d) of the Government Code by articulating the circumstances under which the Department may give a particular complainant priority over others for the purpose of scheduling an intake appointment to file a complaint alleging employment discrimination.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) change “individual” to “person” in each subsection where “individual” appears;
- (2) change “[i]ndividuals” to “[p]ersons who seek to file a complaint for investigation” and “is about to run” to “will run in thirty (30) days or less” at subsection (a);
- (3) add subsection (d), which articulates the Department’s procedure for “instant intake;” and
- (4) several nonsubstantive semantic changes and/or changes to correct grammar or capitalization also were made.

Section 10009. Drafting Complaints Filed for Investigation: This regulation is necessary because it implements, interprets, and makes specific Government Code sections 12930(f) and 12960(b) by articulating the Department’s procedure for drafting employment discrimination complaints, a matter about which the statute is silent.

The text originally noticed to the public was modified prior to the 15-day public comment period to:

- (1) add subsection (b), which states that “[t]he department may omit a complainant’s address, telephone number, and e-mail address on any complaint alleging that the complainant has been subjected to violence or threats of violence including, but not limited to, sexual assault;”
- (2) add “private carrier mail” and “[w]hen requested in writing by an attorney or advocacy organization representing the complainant, the drafted complaint will be sent to the attorney or advocacy organization for review and to obtain the complainant’s signature” to subsection (c);
- (3) add subsection (d), which permits any complainant or complainant’s attorney or advocacy organization to propose modifications to the unsigned complaint, which the DFEH may accept or reject; and
- (4) a change to correct capitalization also was made.

Section 10010. Written Statement or Correspondence as Complaint: This regulation is necessary because it further implements, clarifies, and makes specific Government Code sections 12930(f) and 12960(b) and (d) by articulating the limited circumstances that may lead the Department to accept a written statement or correspondence from a complainant for filing, in lieu of a complaint prepared by the Department in accordance with proposed regulation section 10009.

The text originally noticed to the public was modified prior to the 15-day public comment period to change “limitation” to “limitations” and “section” to “Section” at subsection (a).

Section 10011. Complaints Taken For Filing Purposes Only: This regulation, too, is necessary as it further implements, interprets, and makes

specific Government Code sections 12930(f)(1) and 12960(b) by articulating the Department's procedure for rejecting all or some of a complainant's employment discrimination allegations at intake, a circumstance which arises frequently but about which the statute is silent.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) change "individual" to "person" at subsections (a) and (b);
- (2) add "[t]he department may only reject an allegation if it is clear that the statute of limitations has run and/or that the allegation, if proven, would not constitute a violation of the FEHA" at subsection (b); and
- (3) a nonsubstantive semantic change and a change to correct capitalization also were made.

Section 10012. Director's Complaints: This regulation is necessary because it implements, interprets, and makes specific Government Code sections 12960(b) and 12961 by articulating the Department's procedure for issuance of a Director's complaint alleging employment discrimination, including a non-exhaustive list of factors the Department may consider when determining whether to file a Director's complaint. Section 12960(b) authorizes the filing of a Director's complaint, but is silent regarding applicability and procedure.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) strike "chief of enforcement" and change "chief counsel's designee" to "director's designee" at subsection (a);
- (2) add the phrase "that may be affected by the alleged unlawful practice" at subsection (d)(1);
- (3) strike subsection (e); and
- (4) nonsubstantive semantic changes also were made.

After the 15-day public comment period, nonsubstantial changes were made to strike the phrase "or director's designee" at subsection (a) and "the department considers when" at subsection (d).

Section 10013. Class Complaints [now Class or Group Complaints]:

This regulation is necessary because it implements, interprets, and makes specific Government Code sections 12961 and 12965(a) by articulating the Department's procedure governing class or group complaints alleging employment discrimination, including a non-exhaustive list of factors the Department may consider when determining whether to file a class or group complaint. Section 12961 authorizes the filing of a class or group complaint by the Department, but gives only general guidance regarding applicability and procedure.

The text originally noticed to the public was modified prior to the 15-day public comment period to:

- (1) change “class complaint” to “class or group complaint” in the heading and each subsection where “class complaint” appears;
- (2) change “individual” to “person” in each subsection where “individual” appears;
- (3) strike “and inform the complainant of the decision in writing” at subsection (d);
- (4) change “is a large employer in the community” to “employs a large workforce that may be affected by the alleged unlawful practice, such that the anticipated remedy would impact a large number of individuals or an entire industry” and strike “or the complaint addresses an issue that is unique, critical to the development of the law, or important to the community” at subsection (e)(3);
- (5) strike “and provide the respondent sufficient time to respond in writing to the notice” and add “[a]ny such writing also will be served on the complainant” at subsection (f);
- (6) strike “complaint” and “investigation” at subsection (h)(1); and
- (7) nonsubstantive semantic changes also were made.

Section 10014. Retaliation Complaints – Special Considerations: This regulation is necessary because it implements, interprets, and makes specific sections 12930(f)(1) and 12960(b) of the Government Code, in their application to allegations of retaliatory employment practices, by articulating the Department’s procedure for filing complaints alleging a violation of Government Code section 12940(h). The statute is silent on procedure specific to retaliation complaints.

Section 10015. Disability Complaints – Special Considerations [now Medical Information – Special Considerations]: This regulation is necessary because it implements, interprets, and makes specific sections 12930(f)(1) and 12960(b) of the Government Code in their application to the Department’s procedures for obtaining a complainant’s medical records when the records are necessary to investigate a complaint of employment discrimination.

The text originally noticed to the public was modified prior to the 15-day public comment period to:

- (1) change the heading from “Disability Complaints – Special Considerations” to “Medical Information – Special Considerations” to reflect that the procedures apply equally to all complaints where medical information is at issue, not just disability complaints;
- (2) create subsections;
- (3) modify the text at subsection (a) to articulate an illustrative, non-exhaustive list of the types of complaints to which these procedures apply;
- (4) add at subsections (b), (d), (e) and (f) safeguards to protect privacy and prevent inadvertent or unnecessary disclosure of complainants’ medical records;
- (5) add subsection (c), which states, “If an accusation is issued, all directly relevant medical records or information reasonably necessary to prosecute the accusation or civil complaint, if any, may be disclosed by the department when

disclosure is necessary to further prosecution and/or settlement of the claim;" and

(6) make explicit at subsection (f) that while the Department will abide by a complainant's attorney's requests to protect the privacy of complainant's medical information, "if the department is unable to obtain the medical information and records it deems reasonably necessary to investigate and/or prosecute a complainant's allegations, the department may discontinue the investigation of and close the complaint."

Section 10016. Standard for Accepting Complaint When Act of Harm Occurred Outside California: This regulation is necessary because it articulates the standard the Department uses to determine whether the Department will accept a complaint of employment discrimination when the act of harm occurred outside California, an issue about which the FEHA is silent.

Section 10017. Effect of Prior Waiver Agreement/Release of All Claims: This regulation is necessary because it implements, interprets and makes specific the application of Government Code section 12920 to sections 12930(f)(1) and 12960(b) of the Government Code by articulating the factors the Department considers when determining whether to pursue a complaint when a complainant has executed a prior valid waiver or release of all claims. This issue arises frequently in employment discrimination investigations and is an issue about which the statute is silent.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) include at subsection (a) a list of factors the Department's investigation must initially focus on to determine whether a complainant has validly waived his or her right to file a complaint with the Department;
- (2) add "[s]uch information shall include, but not be limited to, the information identified in section 10017(a) of these regulations" at subsection (b); and
- (3) nonsubstantive semantic changes also were made.

As a result of a comment received during the 15-day comment period, an additional factor, i.e., "whether the waiver was presented in a language understood by the complainant and/or whether interpretative services were provided," was added at subsection (a)(6).

Section 10018. Complaints Taken After Expiration of Statute of Limitation Due to Department Error: This regulation is necessary because it clarifies section 12960(d) of the Government Code by articulating an exception to the one-year statute of limitations for filing a complaint of employment discrimination with the DFEH, as found by the Fair Employment and Housing Commission in *Dept. Fair Empl. & Hous. v. Cairo* (Jan. 6, 1984) No. 84-04, FEHC Precedential Decs. 1984-85, CEB 3 [1984 WL 54284 (Cal.F.E.H.C.)].

Section 10019. Complaints Dual-filed with EEOC: This regulation is necessary because it implements, interprets and makes specific the application of Government Code sections 12930(f)(1), 12960(b), and 12963 of the Government Code to the Department's acceptance of complaints over which the U.S. Equal Employment Opportunity Commission (EEOC) has concurrent jurisdiction. The FEHA is silent on the procedural relationship between the DFEH and the EEOC when complaints are dual-filed.

The text originally noticed to the public was modified prior to the 15-day public comment period to correct the inadvertent omission of the word "which" at subsection (a).

Section 10020. Complaints Transferred to EEOC for Processing: This regulation is necessary because it further implements, interprets and makes specific the application of Government Code sections 12930(f)(1), 12960(b), and 12963 of the Government Code by articulating the circumstances under which a complaint filed for investigation with the Department may be transferred to the EEOC for investigation. The FEHA likewise is silent on each organization's respective responsibility when a complaint is dual-filed.

The text originally noticed to the public was modified prior to the 15-day public comment period to change "individual" to "person" at subsection (a).

Section 10021. Service of Complaints: This regulation is necessary because it clarifies and makes specific the Department's responsibilities and role in serving complaints of employment discrimination under section 12962 of the Government Code.

The text originally noticed to the public was modified prior to the 15-day public comment period to correct the inadvertent omission of the word "to" at subsection (e).

Section 10022. Amending Complaints: This regulation is necessary because it implements, interprets and makes specific sections 12930(f)(1) and 12960(b) of the Government Code by articulating the circumstances and manners in which the Department may amend a complaint of employment discrimination that has already been filed with the DFEH. The statute is silent on the procedure for amending complaints filed with the Department.

The text originally noticed to the public was modified prior to the 15-day public comment period to add "limitation" to "limitations" at subsection (a)(4) and add "or group" at subsection (a)(6).

Section 10023. Response to Complaint: This regulation is necessary because it implements, interprets and makes specific section 12963 of the Government Code by articulating that a respondent is required to submit a

written response to a DFEH complaint of employment discrimination within thirty (30) days of service of the complaint, unless the complaint is referred to the Department's mediation division. The statute is silent about an employer's obligation to submit a response and about the temporary suspension of this requirement when a complaint is referred to mediation.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) change "pre-determination mediation program" to "mediation division;"
- (2) add "the enforcement division shall in writing notify the respondent or, if the respondent is represented, the respondent's attorney, of the exact date the response is due;" and
- (3) nonsubstantive semantic changes also were made.

As a result of comments received during the 15-day comment period, the section was modified for clarity by:

- (1) dividing the section into subsection (a) and subsection (b);
- (2) changing "an automatic stay shall apply" to "[t]he requirement to provide a response shall be temporarily suspended" at subsection (a);
- (3) adding "[n]o response to the complaint is required while the complaint is pending in mediation" at subsection (b); and
- (4) clarifying at subsection (b) that the trigger date for the 21-day period within which a response must be submitted is the date the department notifies the respondent that a response is due because mediation was declined or was unsuccessful.

Section 10024. Conciliation: This regulation is necessary because it implements, clarifies and makes specific sections 12930(f) and 12963.7 of the Government Code by articulating the Department's conciliation procedures applicable to complaints of employment discrimination.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) make explicit at subsection (a) that conciliation is undertaken by the Department's Enforcement Division;
- (2) add at subsection (a) "[w]henever a complainant or respondent is represented by an attorney or advocacy organization, enforcement staff shall communicate with the party's attorney or advocate regarding settlement;"
- (3) delete subsections (c) and (d) pertaining to mediation;
- (4) add at subsection (e) that each party's attorney or advocate, if any, also will be invited to participate in a conciliation or mediation conference; and
- (5) strike "executed" at subsection (f)(2).

Section 10025. DFEH Mediation Division Services: This regulation is necessary because it implements, clarifies and makes specific sections 12930 (f) and 12963.7 of the Government Code by articulating the Department's mediation

procedures applicable to complaints of employment discrimination. This section was not included in the text of the proposed regulations that was originally noticed to the public. In the text as originally proposed, the Department's conciliation and related mediation procedures were addressed in the same regulation. For clarity, this section was added prior to the 15-day public comment period to separately address the procedures of the Department's Mediation Division. This modification is sufficiently related to the original text so that the public was adequately placed on notice that this change could result, as required by Government Code section 11346.8(c).

As a result of comments received during the 15-day comment period, the section was modified for clarity by:

- (1) changing "suspended" to "temporarily suspended" and replacing "complaint is returned to the enforcement division for investigation" with "department notifies the respondent that a response is due because mediation was declined or was unsuccessful" at subsection (b);
- (2) adding "or who has subsequently been assigned the case" at subsection (d);
- (3) adding "refer the complaint to" before "Fair Employment and Housing Commission administrative law judge or commissioner" at subsection (h);
- (4) replacing "[e]verything that transpires at a mediation conference is" with "[t]he mediation process is" at subsection (i); and
- (5) a nonsubstantive semantic change also was made.

The section also was modified for clarity after the 15-day comment period to make explicit at subsection (h) that "[w]henver a complainant or respondent is represented by an attorney or advocacy organization, the assigned mediator shall communicate with the party's attorney or advocate regarding scheduling and settlement."

Section 10025 [now 10026]. Complaint Investigation: This regulation is necessary because it implements, clarifies and makes specific sections 12930(f)-(g), 12963, 12963.1-12962.5 of the Government Code by articulating a number of points about DFEH investigations that are not articulated in the statute, e.g., (1) where it is disputed or unclear that the Department has jurisdiction over a particular respondent or allegation, the investigation initially focuses on obtaining the information and documents necessary to determine whether the Department has jurisdiction; (2) during the course of its investigation the Department may, but is not required, to issue and serve investigative subpoenas, written interrogatories, and requests for production of books, records and documents; and (3) for all workplace discrimination complaints, the Department must obtain the complainant's complete personnel file or files from the respondent.

The text originally noticed to the public was modified prior to the 15-day public comment period to:

- (1) change "individual or organization" to "person or entity" at subsection (c);

- (2) add “after requesting compliance in writing and/or by telephone” at subsection (c);
- (3) capitalize “Section” at subsection (c);
- (4) change “critical” to “relevant” at subsection (d); and
- (5) delete “[f]or a workplace disability discrimination complaint, for example, critical evidence includes, but is not limited to, specific information regarding the essential functions of the job or jobs at issue and all relevant medical records of the complainant” at subsection (d).

Section 10026 [now 10027]. Investigative Subpoenas: This regulation is necessary because it implements, clarifies and makes specific sections 12930(g) and 12963.1 of the Government Code by articulating that the Department’s authority to issue subpoenas includes the authority to issue investigative subpoenas for interviews in employment discrimination cases. Although the FEHA specifically addresses subpoenas, it does not address the primary purpose for which the Department issues and serves subpoenas, i.e., to conduct interviews during an investigation. The regulation further implements, interprets and makes specific sections 12930(g) and 12963.1 of the Government Code by specifying the Department’s procedure for issuing investigative subpoenas for interviews and conducting interviews pursuant to a subpoena.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) add subsection (b), defining “investigative interview;” and
- (2) strike subsection (e), which became duplicative after the addition of subsection (b).

Section 10027 [now 10028]. Investigative Requests for Production and Inspection: This regulation implements, interprets and makes specific sections 12930(g) and 12963.4 of the Government Code by articulating that the “physical materials” the department has authority to inspect in connection with an investigation include land or other commercial or real property such as worksites. Although the FEHA specifically addresses requests for production for inspection of books, records, documents, etc., it does not address an important purpose for which the Department must sometimes issue and serve a request for production for inspection, i.e., to enter a workplace and inspect a worksite at issue in a complaint under investigation by the Department. The regulation also specifies that the Department’s inspection authority extends to electronically stored information, about which the statute also is silent, and articulates the Department’s procedure for requesting production and inspection and the deadline for a respondent’s compliance.

The text originally noticed to the public was modified prior to the 15-day public comment period to capitalize “Section” at subsection (a).

Section 10028 [now 10029]. Priority Case Processing/Case Grading

System: This regulation is necessary because it implements, interprets and makes specific sections 12930(f)(1) and 12963 of the Government Code by articulating the Department's implementation of a case grading system to prioritize employment investigations, better allocate resources, and facilitate collaboration between the Department's Enforcement and Legal Divisions early in the investigative process. The regulation further implements, clarifies and makes specific sections 12930(f)(1) and 12963 of the Government Code by identifying a non-exhaustive list of factors the Department may consider when prioritizing investigations of complaints alleging employment discrimination. The FEHA is silent about prioritization of case investigations.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) strike "raises complex factual or legal issues" at subsection (b);
- (2) add "which the department shall investigate" at subsection (c);
- (3) strike "complexity" at subsection (e)(2);
- (4) change "large enough" to "employs a large workforce that may be affected by the alleged unlawful practice" at subsection (e)(4); and
- (5) a nonsubstantive semantic change also was made.

Section 10029 [now 10030]. Investigations Not Completed Within

Statutory Time Limit: This regulation is necessary because it implements, interprets and makes specific section 12965(a) of the Government Code by articulating the Department's procedure for continued investigation of an employment discrimination complaint in the limited instances where the Department has not been able to complete an investigation within the statutory time limit, a circumstance about which the statute is silent. This regulation further specifies that although the Department may not issue an accusation when an investigation is completed after the statutory time limit, and a complaint has been found meritorious, the Department may, in its discretion, issue a Director's complaint.

The text originally noticed to the public was modified prior to the 15-day public comment period to add "or mediation" at subsection (b).

Section 10030. Receipt of Confidential Information: This section was originally noticed to the public, but was deleted prior to the 15-day public comment period for clarity purposes.

Section 10031. Accusation: This regulation is necessary because it implements, interprets and makes specific section 12965(a) of the Government Code by articulating a non-exhaustive list of factors, not specified in the FEHA, which the Department may consider when determining whether the issuance of an accusation in an employment discrimination case is warranted.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to add “or mediation” at subsection (b) and make a nonsubstantive semantic change at subsection (c).

Section 10032. Notice of Case Closure: This regulation is necessary because it implements, clarifies and makes specific sections 12965(b) and 12971 of the Government Code by articulating that, for complaints alleging unlawful employment practices forbidden by the FEHA for which a right-to-sue has not already been issued, a notice of case closure also constitutes a right-to-sue notice. This fact is not apparent from the statute. The regulation further articulates that the Department will provide any complainant whose case it closes a list of resources for locating private counsel or filing a civil complaint in small claims court. The regulation also specifies that when closing a complaint dual-filed with the EEOC, the Department must satisfy all reporting requirements arising from its work-sharing agreement with the EEOC. Neither of these facts is articulated in the statute.

Section 10033. Departmental Appeal: This regulation is necessary because it implements, interprets, and makes specific section 12971 of the Government Code by articulating the process by which an aggrieved party may request that the Department reconsider its rejection of the aggrieved party’s complaint or closure of his or her case. A procedure for appealing complaint rejections and case closures is not articulated in the statute.

The text originally noticed to the public was modified to reflect organizational changes in the Department and for clarity prior to the 15-day public comment period to:

- (1) change “individual” to “person” in each subsection where “individual” appears;
- (2) change “verbal” to “oral” in each subsection where “verbal” appears;
- (3) change “district or regional administrator” to “district administrator or, if there is no district administrator, the regional administrator” at subsections (a), (b) and (i);
- (4) change “deputy director of employment” to “regional administrator or his or her designee” at subsection (c);
- (5) change “deputy director of employment” to “regional administrator” at subsections (d) and (e);
- (6) change “director” to “chief of enforcement” at subsections (e) and (f);
- (7) add “[a]ny person dissatisfied with the response of the chief of enforcement may direct his or her further appeal to the director” at subsection (g);
- (8) add “[r]egardless whether the further appeal is oral or written, the director, or his or her designee, shall respond in writing” at subsection (h);
- (9) add “[a]ny person dissatisfied with the response of the district administrator may direct his or her concerns to the regional administrator or his or her designee” at subsection (k);
- (10) strike “district” at subsection (l);

(11) change “deputy director of employment” to “chief of enforcement at subsection (l) and (m); and
(12) a change in capitalization also was made.

Section 10034. EEOC Substantial Weight Review: This regulation is necessary because it further interprets, clarifies and makes specific section 12971 of the Government Code by articulating the right of a party aggrieved by the Department’s closure of a complaint dual-filed with the EEOC to request that the EEOC conduct a substantial weight review in accordance with its own procedures, a right which is not articulated in the FEHA.

Section 10035. Filing a Complaint of Housing Discrimination with the Department: This regulation is necessary because it clarifies and makes specific the “particulars” mentioned in Government Code section 12980(a) that must be included in a complaint of housing discrimination filed with the Department. The regulation further is necessary because it specifies the “other information” mentioned in the statute, which the Department requires a complainant of housing discrimination include.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) change “individual” to “person” at subsection (a);
- (2) strike “or characteristic” at subsection (a)(7);
- (3) clarify the statement required to verify a DFEH complaint at subsection (a)(9);
- (4) add “unless the complaint is filed electronically” at subsection (a)(10);
- (5) articulate what is required to verify a complaint filed online at newly added subsection (a)(11);
- (6) change “section” to “Section” at subsection (b) (formerly erroneously subsection (c));
- (7) add “all complaints not filed online via the Department’s Web site” and change “limitation” to “limitations” at subsection (c) (formerly erroneously subsection (d)); and
- (8) add at subsection (d) (formerly erroneously subsection (e)) “[t]he filing date for complaints filed via the department’s Web site shall be the date on which the complaint was submitted online, which is printed on the complaint after the words “DATE FILED.” ”

After the 15-day public comment period, the section was modified to correct a typographical error that resulted in the inadvertent omission of a subsection (b). Also, “private carrier mail (e.g., FedEx),” was added at subsection (c).

Section 10036. Liberal Construction: This regulation is necessary because it implements, clarifies and makes specific how sections 12920, 12921(a), and 12993(a) of the Government Code apply to the manner in which the Department construes complaints of housing discrimination filed pursuant to Government

Code section 12980. Section 12980 itself is silent on the broad manner in which the Department must construe complaints.

The text originally noticed to the public was modified prior to the 15-day public comment period to make semantic changes and to clarify that liberal construction applies equally to harassment complaints filed with the Department pursuant to Government Code section 12980.

Section 10037. Filing a Housing Discrimination Complaint with the Department Alleging a Violation of the Unruh Civil Rights Act, Ralph Civil Rights Act, or Disabled Persons Act: This regulation is necessary because it implements, interprets, and makes specific Government Code section 12930(f)(2) by articulating the procedures of the Department that apply to Unruh Civil Rights Act (Civil Code section 51), Ralph Civil Rights Act (Civil Code section 51.7), and Disabled Persons Act (Civil Code section 54 et seq.) complaints that allege housing discrimination, depending upon whether the complaint also states allegations over which HUD has concurrent jurisdiction.

The text originally noticed to the public was modified prior to the 15-day public comment period for clarity and to delete subsection (c), which was duplicative of the statutory provisions at Government Code section 12960(d)(3) and (d)(4).

Section 10038. Intake: This regulation is necessary because it implements sections 12930 and 12980(a) of the Government Code by articulating the Department's intake procedures for housing discrimination complaints. Intake procedures are not specified in the FEHA.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) change "individual" to "person" in each subsection where individual appears;
- (2) change "where appropriate" to "where it appears that the department may have jurisdiction" at subsection (a);
- (3) strike "or characteristic" at subsection (c)(8);
- (4) add "[w]here there is doubt about whether the statute of limitations has run, the complaint shall be taken by the department and the issue of timeliness investigated and analyzed during the investigation" at subsection (g)(2);
- (5) strike "co-respondent" at subsection (g)(3);
- (6) change "jurisdictional" to "over which [another state agency] may have jurisdiction" at subsection (h); and
- (7) correction of a subsection ordering error and several nonsubstantive semantic changes and/or changes to correct grammar or capitalization also were made.

Section 10039. Priority Intake: This regulation is necessary because it further implements sections 12930 and 12980(a) of the Government Code by articulating the circumstances under which the Department may give a particular

complainant priority over other complainants for the purpose of scheduling an intake appointment to file a housing discrimination complaint.

The text originally noticed to the public was modified prior to the 15-day public comment period to:

- (1) change “individual” to “person” in each subsection where “individual” appears;
- (2) change “is about to run” to “will run in thirty (30) days or less” at subsection (a)(1);
- (3) add subsection (a)(5), which states “homeless persons and persons at risk of institutionalization;”
- (4) add subsection (b), which specifies when a complaint alleging retaliatory housing practices will be prioritized; and
- (5) a nonsubstantive semantic change and a change to correct capitalization also were made.

Section 10040. Testing: This regulation is necessary because it clarifies section 12985 of the Government Code by articulating that Department staff may conduct a telephone test during the intake of a housing discrimination complaint, before a complaint is filed, to test for discriminatory selection practices, without identifying themselves or the purpose of their inquiry. This practice is not apparent from the statute.

Section 10041. Drafting Housing Discrimination Complaints: This regulation is necessary because it implements, interprets, and makes specific Government Code sections 12930(f) and 12980(a) by articulating the Department’s procedure for drafting housing discrimination complaints, about which the statute is silent.

The text originally noticed to the public was modified prior to the 15-day public comment period to:

- (1) create subsections for clarity;
- (2) capitalize “Section” in subsection (a);
- (3) add “[w]hen requested in writing by an attorney or advocacy organization representing the complainant, the drafted complaint will be sent to the attorney or advocacy organization for review and to obtain the complainant’s signature” to subsection (c); and
- (4) add subsection (d), which permits any complainant or complainant’s attorney or advocacy organization to propose modifications to the unsigned complaint, which the DFEH may accept or reject.

As a result of a comment received during the 15-day comment period, subsection (b), which states “[t]he department may omit a complainant’s address, telephone number, and e-mail address on any complaint alleging that the complainant has been subjected to violence or threats of violence including, but not limited to, sexual assault” was added to conform this proposed housing regulation to its counterpart in the employment subchapter.

Section 10042. Written Statement or Correspondence as Complaint:

This regulation is necessary because it further implements and makes specific Government Code sections 12930(f) and 12980(a) by articulating the limited circumstances that may lead the Department to accept a written statement or correspondence from a complainant for filing, in lieu of a complaint prepared by the Department in accordance with proposed regulation section 10041.

The text originally noticed to the public was modified prior to the 15-day public comment period to change “limitation” to “limitations” and “section” to “Section” at subsection (a).

Section 10043. Multiple Complainants: This regulation is necessary because it further implements, interprets, and makes specific Government Code sections 12930(f) and 12980(a) by articulating the Department’s procedure for taking complaint(s) when more than one complainant has been aggrieved by the same unlawful housing practice, including minor children. This procedure, too, is not articulated in the statute.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to change “Guardian Ad Litem” to “on behalf of the minor child” at subsection (b)(2).

Section 10044. HUD-Generated Complaints: This regulation is necessary because it further implements, clarifies, and makes specific Government Code sections 12930(f) and 12980(a) by articulating the Department’s procedure for intake and filing complaints of housing discrimination that were initially filed with, and referred to the Department for investigation by HUD. The FEHA is silent on the procedural relationship between the DFEH and HUD when complaints are dual-filed.

Section 10045. Department-Generated Complaints: This regulation further implements, clarifies, and makes specific Government Code sections 12930(f) and 12980(a) by articulating the Department’s procedure for referring to HUD for dual-filing all housing discrimination complaints originally filed with the Department over which HUD has concurrent jurisdiction. The FEHA likewise is silent on each organization’s respective responsibility when a complaint is dual-filed.

Section 10046. Director’s Complaints: This regulation is necessary because it implements, interprets, and makes specific Government Code sections 12960(b) and 12980(a) by articulating the Department’s procedure for issuance of a Director’s complaint alleging housing discrimination, including a non-exhaustive list of factors the Department may consider when determining whether to file a Director’s complaint. Section 12960(b) authorizes the filing of a Director’s complaint but is silent regarding applicability and procedure.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) strike “chief of enforcement” and change “chief counsel’s designee” to “director’s designee” at subsection (a);
- (2) strike “significant” and “entire industry” at subsection (d)(1);
- (3) strike subsection (e); and
- (4) nonsubstantive semantic changes also were made.

After the 15-day public comment period, nonsubstantial changes were made to strike the phrase “or director’s designee” at subsection (a) and “the department considers when” at subsection (d).

Section 10047. Class Complaints [now Class or Group Complaints]:

This regulation is necessary because it implements, interprets, and makes specific Government Code sections 12961 and 12980(a) by articulating the Department’s procedure governing class or group complaints alleging housing discrimination, including a non-exhaustive list of factors the Department may consider when determining whether to file a class or group complaint. Section 12961 authorizes the filing of a class or group complaint by the Department, but gives only general guidance regarding applicability and procedure.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) change “class complaint” to “class or group complaint” in the heading and each subsection where “class complaint” appears;
- (2) change “individual” to “person” in each subsection where “individual” appears;
- (3) strike “and provide the respondent sufficient time to respond in writing to the notice” and add “[a]ny such writing also will be served on the complainant” at subsection (f);
- (4) strike “complaint” and “investigation” at subsection (h)(1); and
- (5) nonsubstantive semantic changes also were made.

Section 10048. Retaliation Complaints – Special Considerations: This regulation is necessary because it implements, interprets, and makes specific sections 12930(f)(1) and 12980(b) of the Government Code, in their application to allegations of retaliatory housing practices, by articulating the Department’s procedure for filing complaints alleging retaliation in violation of Government Code sections 12955 and/or 12955.7. The statute is silent on procedure specific to retaliation complaints.

The text originally noticed to the public was modified prior to the 15-day public comment period to change “limitation” to “limitations” at subsection (c) .

Section 10049. First Amendment Policy [now Julie Waltz First Amendment Policy]: This regulation is necessary because it further

implements, clarifies, and makes specific sections 12930(f) and 12980(a) and (c) of the Government Code by articulating the Department's procedure for identifying—and its procedure for receiving, investigating and conciliating—housing discrimination complaints that implicate First Amendment rights. Procedures specific to complaints implicating First Amendment Rights are not articulated in the statute.

The text originally noticed to the public was modified prior to the 15-day public comment period to change the heading from “First Amendment Policy” to “Julie Waltz First Amendment Policy.” This change was necessitated by a settlement agreement and stipulation for dismissal with prejudice entered into by the Department in *Waltz v. Brumfield*, Case No. 5:08-cv-00432-JTM-OP (C.D.Cal., June 2010), a case which implicated First Amendment Rights. The text was further modified at section (f)(1) to change “consultant” to “enforcement division staff member assigned to investigate the complaint.”

Section 10050. Disability Complaints – Special Considerations [now Medical Information – Special Considerations]: This regulation is necessary because it implements, interprets, and makes specific sections 12930(f) and 12980(a) of the Government Code in their application to the Department's procedures for obtaining a complainant's medical records when necessary to investigate a complaint of housing discrimination.

The text originally noticed to the public was modified prior to the 15-day public comment period to:

- (1) change the heading from “Disability Complaints – Special Considerations” to “Medical Information – Special Considerations” to reflect that the procedures apply equally to all complaints where medical information is at issue, not just disability complaints;
- (2) create subsections;
- (3) modify the text at subsection (a) to articulate an illustrative, non-exhaustive list of the types of complaints to which these procedures apply;
- (4) add at subsections (b), (d), (e) and (f) safeguards to protect privacy and prevent inadvertent or unnecessary disclosure of complainants' medical records;
- (5) add subsection (c), which states “If an accusation is issued, all directly relevant medical records or information reasonably necessary to prosecute the accusation or civil complaint, if any, may be disclosed by the department when disclosure is necessary to further prosecution and/or settlement of the claim;” and
- (6) make explicit at subsection (f) that while the Department will abide by a complainant's attorney's requests to protect the privacy of complainant's medical information, “if the department is unable to obtain the medical information and records it deems reasonably necessary to investigate and/or prosecute a complainant's allegations, the department may discontinue the investigation of and close the complaint.”

Section 10051. Effect of Prior Waiver Agreement/Release of All Claims:

This regulation is necessary because it implements, interprets and makes specific the application of Government Code section 12920 to sections 12930(f)(1) and 12980(a) of the Government Code by articulating the factors the Department considers when determining whether to pursue a complaint when a complainant has executed a prior valid waiver or release of all claims. This issue arises on occasion in housing discrimination investigations and is an issue about which the statute is silent.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) include at subsection (a) a list of factors the Department's investigation must initially focus on to determine whether a complainant has validly waived his or her right to file a complaint with the Department;
- (2) add "[s]uch information shall include, but not be limited to, the information identified in section 10051(a) of these regulations" at subsection (b); and
- (3) nonsubstantive semantic changes also were made.

As a result of a comment received during the 15-day comment period, an additional factor, i.e., "whether the waiver was presented in a language understood by the complainant and/or whether interpretative services were provided," was added at subsection (a)(6).

Section 10052. Complaints Taken After Expiration of Statute of

Limitation Due to Department Error: This regulation is necessary because it clarifies section 12980(a) of the Government Code by articulating an exception to the one-year statute of limitations for filing a complaint of housing discrimination with the DFEH, as found by the Fair Employment and Housing Commission in *Dept. Fair Empl. & Hous. v. Cairo* (Jan. 6, 1984) No. 84-04, FEHC Precedential Decs. 1984-85, CEB 3 [1984 WL 54284 (Cal.F.E.H.C.)].

Section 10053. Service of Complaints: This regulation is necessary because it clarifies and makes specific the Department's responsibilities and role in serving complaints of housing discrimination under section 12986 of the Government Code.

Section 10054. Amending Complaints: This regulation is necessary because it implements, interprets and makes specific sections 12930(f)(1) and 12980(a) of the Government Code by articulating the circumstances and manners in which the Department may amend a complaint of housing discrimination that has already been filed with the DFEH. The statute is silent on the procedure for amending complaints filed with the Department.

The text originally noticed to the public was modified prior to the 15-day public comment period to change "limitation" to "limitations" at subsections (a)(1) and (4) and add "or group" at subsection (a)(6).

Section 10055. Response to Complaint: This regulation is necessary because it implements, interprets and makes specific section 12986 of the Government Code by articulating that a respondent is required to submit a written response to a DFEH housing discrimination complaint within twenty (20) days of service of the complaint, unless the complaint is referred to the Department's mediation division. The statute mentions only that a respondent may submit an answer to the complaint.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) change "pre-determination mediation program" to "mediation division;"
- (2) add "the enforcement division shall in writing notify the respondent or, if the respondent is represented, the respondent's attorney, of the exact date the response is due;" and
- (3) nonsubstantive semantic changes also were made.

As a result of comments received during the 15-day comment period, the section was modified for clarity by:

- (1) dividing the section into subsection (a) and subsection (b);
- (2) changing "an automatic stay shall apply" to "[t]he requirement to provide a response shall be temporarily suspended" at subsection (a);
- (3) adding "[n]o response to the complaint is required while the complaint is pending in mediation" at subsection (b); and
- (4) clarifying at subsection (b) that the trigger date for the 21-day period within which a response must be submitted is the date the Department notifies the respondent that a response is due because mediation was declined or was unsuccessful.

Section 10056. Conciliation: This regulation is necessary because it implements, clarifies and makes specific sections 12930(f), 12980(i) and 12984 of the Government Code by articulating the Department's conciliation procedures applicable to complaints alleging housing discrimination.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) make explicit at subsection (a) that conciliation is undertaken by the Department's Enforcement Division;
- (2) add at subsection (a) "[w]henver a complainant or respondent is represented by an attorney or advocacy organization, enforcement staff shall communicate with the party's attorney or advocate regarding settlement;"
- (3) delete subsections (c) and (d) pertaining to mediation;
- (4) add at subsection (e) that each party's attorney or advocate, if any, also will be invited to participate in a conciliation or mediation conference; and
- (5) strike "executed" at subsection (f)(2).

Section 10057. DFEH Mediation Division Services: This regulation is necessary because it implements, clarifies and makes specific sections 12930(f), 12980(i) and 12984 of the Government Code by articulating the Department's mediation procedures applicable to complaints alleging housing discrimination. This section was not included in the text of the proposed regulations that was originally noticed to the public. In the text as originally proposed, the Department's conciliation and related mediation services were addressed in the same regulation. For clarity, this section was added prior to the 15-day public comment period to separately address the procedures of the Department's Mediation Division. This modification is sufficiently related to the original text so that the public was adequately placed on notice that this change could result, as required by Government Code section 11346.8(c).

As a result of comments received during the 15-day comment period, the section was modified for clarity by:

- (1) changing "suspended" to "temporarily suspended" and replacing "complaint is returned to the enforcement division for investigation" with "department notifies the respondent that a response is due because mediation was declined or was unsuccessful" at subsection (b);
- (2) adding "or who has subsequently been assigned the case" at subsection (d);
- (3) adding "refer the complaint to" before "Fair Employment and Housing Commission administrative law judge or commissioner" at subsection (h);
- (4) replacing "[e]verything that transpires at a mediation conference is" with "[t]he mediation process is" at subsection (i); and
- (5) a nonsubstantive semantic change also was made.

The section also was modified for clarity after the 15-day comment period to make explicit at subsection (h) that "[w]henver a complainant or respondent is represented by an attorney or advocacy organization, the assigned mediator shall communicate with the party's attorney or advocate regarding scheduling and settlement."

Section 10057 [now 10028]. Complaint Investigation: This regulation is necessary because it implements, clarifies and makes specific sections 12930(f)-(g), 12963, 12963.1-12962.5 and 12980(c) of the Government Code by articulating a number of points about DFEH investigations that are not articulated in the statute, e.g., (1) where it is disputed or unclear that the Department has jurisdiction over a particular respondent or allegation, the investigation will initially focus on obtaining the information and documents necessary to determine whether the Department has jurisdiction; and (2) during the course of its investigation the Department may, but is not required, to issue and serve investigative subpoenas, written interrogatories, and requests for production of books, records and documents.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) change “individual or organization” to “person or entity” at subsection (c);
- (2) add “after requesting compliance in writing and/or by telephone” at subsection (c);
- (3) capitalize “Section” at subsection (c);
- (4) change “critical” to “relevant” at subsection (d); and
- (5) delete “[f]or disability discrimination complaints alleging denial of a reasonable accommodation, for example, critical evidence includes, but is not limited to, relevant medical information pertaining to the complainant” at subsection (d).

Section 10058 [now 10059]. Investigative Subpoenas: This regulation is necessary because it implements, clarifies and makes specific sections 12930(g), 12963.1 and 12980(c) of the Government Code by articulating that the Department’s authority to issue subpoenas includes the authority to issue investigative subpoenas for interviews in housing discrimination cases. Although the FEHA specifically addresses subpoenas, it does not address the primary purpose for which the Department issues and serves subpoenas, i.e., to conduct interviews during an investigation. The regulation further implements, interprets and makes specific sections 12930(g) and 12963.1 and 12980(c) of the Government Code by specifying the Department’s procedure for issuing investigative subpoenas for interviews and conducting interviews pursuant to a subpoena.

The text originally noticed to the public was modified for clarity prior to the 15-day public comment period to:

- (1) add subsection (b), defining “investigative interview;” and
- (2) strike subsection (e), which became duplicative after the addition of subsection (b).

Section 10059 [now 10060]. Investigative Requests for Production and Inspection: This regulation is necessary because it implements, interprets and makes specific sections 12930(g), 12963.4 and 12980(c) of the Government Code by articulating that the “physical materials” the department has authority to inspect in connection with an investigation include land or other commercial or real property such as a building management office or housing accommodation. Although the FEHA specifically addresses requests for production for inspection of books, records, documents, etc., it does not address an important purpose for which the Department must sometimes issue and serve a request for production for inspection, i.e., to enter a building management office or housing accommodation at issue in a complaint under investigation by the Department. The regulation also specifies that the Department’s inspection authority extends to electronically stored information, about which the statute is also silent, and articulates the Department’s procedure for requesting production and inspection and the deadline for a respondent’s compliance.

The text originally noticed to the public was modified prior to the 15-day public comment period to capitalize “Section” at subsection (a).

Section 10060 [now 10061]. Priority Case Processing/Case Grading

System: This regulation is necessary because it implements, interprets and makes specific sections 12930(f)(1), 12963 and 12980(c) of the Government Code by articulating the Department's implementation of a case grading system to prioritize housing discrimination investigations, better allocate resources, and facilitate collaboration between the Department's Enforcement and Legal Divisions early in the investigative process. The regulation further implements, clarifies and makes specific sections 12930(f)(1), 12963 and 12980(c) of the Government Code by identifying a non-exhaustive list of factors the Department may consider when prioritizing investigations of complaints alleging housing discrimination. The FEHA is silent about prioritization of case investigations.

The text originally noticed to the public was modified prior to the 15-day public comment period to:

- (1) add the factor "complaints filed by homeless individuals or person at risk of institutionalization" at subsection (a);
- (2) strike "raises complex factual or legal issues" and "initially" at subsection (b);
- (3) strike "preliminarily" and add "which the department shall investigate" at subsection (c);
- (4) strike "initial" at subsection (d);
- (5) strike "complexity" at subsection (e)(2); and
- (6) strike "or an entire industry" at subsection (e)(4).

Section 10061 [now 10062]. Investigations Not Completed Within

Statutory Time Limit: This regulation is necessary because it implements, interprets and makes specific sections 12965(a) 12980(f) and 12981(a) of the Government Code by articulating the Department's procedure for continued investigation of a housing discrimination complaint in the limited instances where the Department has not been able to complete an investigation within the statutory time limit, a circumstance about which the statute is silent. This regulation further specifies that although the Department may not issue an accusation when an investigation is completed after the statutory time limit, and a complaint has been found meritorious, the Department may, in its discretion, issue a Director's complaint.

The text originally noticed to the public was modified prior to the 15-day public comment period to add "or mediation" at subsection (b).

Section 10062. Receipt of Confidential Information: This section was originally noticed to the public, but was deleted prior to the 15-day public comment period for clarity purposes.

Section 10063. Accusation: This regulation is necessary because it implements, interprets and makes specific sections 12965(a) and 12981(a) of the Government Code by articulating a non-exhaustive list of factors, not specified in

the FEHA, which the Department may consider when determining whether the issuance of an accusation in a housing discrimination case is warranted.

The text originally noticed to the public was modified prior to the 15-day public comment period to add “or mediation” at subsection (b) and make a nonsubstantive semantic change at subsection (c).

Section 10064. Notice of Case Closure: This regulation is necessary because it implements, clarifies and makes specific sections 12971 and 12980(a) of the Government Code by articulating the Department’s procedures when closing a case, including providing any complainant whose case it closes a list of resources for locating private counsel or filing a civil complaint in small claims court. The proposed regulation also specifies that when closing a complaint dual-filed with HUD, the Department must satisfy all reporting requirements arising from its work-sharing agreement with HUD. Neither of these facts is articulated in the statute.

Section 10065. Departmental Appeal: This regulation is necessary because it implements, interprets, and makes specific sections 12971 and 12980 of the Government Code by articulating the process by which an aggrieved party may request that the Department reconsider its rejection of the aggrieved party’s complaint or closure of his or her case. A procedure for appealing complaint rejections and case closures is not articulated in the statute.

The text originally noticed to the public was modified to reflect organizational changes in the Department and for clarity prior to the 15-day public comment period to:

- (1) change “individual” to “person” in each subsection where “individual” appears;
- (2) change “verbal” to “oral” in each subsection where “verbal” appears;
- (3) change “district or regional administrator” to “district administrator or, if there is no district administrator, the regional administrator” at subsections (a), (b) and (j);
- (4) change “deputy director of housing” to “regional administrator or his or her designee” at subsection (c);
- (5) change “deputy director of housing” to “regional administrator” at subsections (d) and (e);
- (6) change “director” to “chief of enforcement” at subsections (e) and (f);
- (7) add “[a]ny person dissatisfied with the response of the chief of enforcement may direct his or her further appeal to the director” at subsection (g);
- (8) add “[r]egardless whether the further appeal is oral or written, the director, or his or her designee, shall respond in writing” at subsection (h);
- (9) add “[a]ny person dissatisfied with the response of the district administrator may direct his or her concerns to the regional administrator or his or her designee” at subsection (k);
- (10) strike “district” at subsection (l);

(11) change “deputy director of housing ” to “chief of enforcement at subsection (l) and (m); and
(12) a change in capitalization also was made.

Section 10066. Substantial Equivalence: This regulation is necessary because it implements, interprets and makes specific Government Code section 12955.6 by articulating that the provisions of the FEHA affording remedies to victims of housing discrimination must be construed to afford the same remedies as those afforded under the federal Fair Housing Amendments Act (FHA) and its implementing regulations, unless those afforded by the FEHA are greater. The FEHA makes no mention of the requirement the protections it affords must be at least substantially equivalent to those afforded by the FHA in order for the Department to receive referrals and funding from HUD.

The Department has determined that all modifications made are sufficiently related to the original text so that the public was adequately placed on notice that these changes could result, as required by Government Code Section 11346.8(c). In addition, all changes made after the 15-day public comment are period nonsubstantial.

LOCAL MANDATE DETERMINATION

The proposed regulations do not impose any mandate on local agencies or school districts.

ALTERNATIVES DETERMINATION

The proposed regulations impose no duties or obligations not already imposed by existing law. The Department has determined that no alternative would be more effective in carrying out the purposes for which these regulations are proposed or would be as effective and less burdensome to affected private persons than the proposed regulations.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF FEBRUARY 19, 2010 THROUGH MAY 26, 2010

The original proposed text was made available to the public from February 19, 2010 through May 26, 2010. One e-mail and six written comment letters were received during that period, five of which were received at the public hearing on May 26, 2010. Pursuant to Government Code section 11346.9(a)(3) and (a)(5), the DFEH has summarized and responded to those written comments as follows:

J. Anthony Vittal, Esq. e-mail dated 2/19/10:

Comment A1: The commenter recommends that the department mandate e-filing in an effort to save money.

Reject: The Department declines to modify the text of its proposed regulations to accommodate this comment. Although it is the goal of the Department to make online filing available for all complaints over which the Department has jurisdiction, currently the Department only has an online system in place for requesting an immediate right-to-sue. Mandating e-filing at this time would therefore be premature.

Leslie Ann Boyce, Esq. letter, with enclosures, dated 4/30/10:

Comment B1: The commenter recommends that the department issue a regulation stating that the one-year statute of limitations to file a civil action under the FEHA runs from the date of receipt of the notice the Department is required to issue under Government Code section 12965(b).

Reject: The recommended regulation appears to conflict with Government Code section 12965(b), which states, in pertinent part: “If an accusation is not issued within 150 days after the filing of a complaint, or if the department earlier determines that no accusation will issue, the department shall promptly notify, in writing, the person claiming to be aggrieved that the department shall issue, on his or her request, the **right-to-sue notice**. **This notice** shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization, or employment agency named in the verified complaint **within one year from the date of that notice**.” [Emphasis added.] To comply with the statute, the Department’s right-to-sue notices say: “The civil action must be filed within one year from the date of this letter.”

The commenter asserts that, notwithstanding the Department’s interpretation, the date on which the statute begins to run (“trigger date”) is unclear and is a matter than remains unresolved by California courts. In support of her assertion that the trigger date runs from the date of receipt of notice, the commenter relies on Ninth Circuit authority deciding the trigger date for the statute of limitations under the FEHA’s federal counterpart, Title VII of the Civil Rights Act of 1964 (Title VII), which states in pertinent part: “If a charge filed with the Commission ... is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge ... the Commission has not filed a civil action ... or ... entered into a conciliation agreement to which the person aggrieved is a party, the Commission .. shall so notify the person aggrieved and within ninety days **after the giving of such notice** a civil action may be brought against the respondent named in the charge ...” (42 U.S.C. section 2000e-5(f)(1).) Because the language of the parallel provision of Title VII differs significantly from the language of the FEHA at issue, the cases on which the commenter relies do not resolve the state law issue the commenter asks the Department to decide.

The Department declines to make the commenter’s requested change. The department’s rulemaking authority is limited to promulgating regulations to carry out the Department’s functions and duties under the FEHA. The requested regulation, which requires the Department to decide a substantive right the

commenter states California courts have yet to resolve, exceeds the limited scope of the Department's rulemaking authority.

Fair Employment and Housing Commission memo dated 5/26/10:

Comment C1: Section 10001--Definitions: The Commission makes several assertions regarding section 10001 of the proposed regulations, which are addressed separately below:

C1a: The Commission asserts that the definitional section of the proposed regulations provides substantive definitions of a number of terms, including: "continuing violation" (section 10001(g)); "housing accommodation" (section 10001(o)); "protected activity" (section 10001(p)); "protected basis" (section 10001(q)) and "co-respondent" (section 10001(h)). The Commission suggests that substantive definitions may have a limiting legal effect on future interpretation and construction of the definitions by the assigned adjudicatory body, and that in some instances the proposed definitions are narrower than prior case interpretations. The Commission therefore recommends deleting the definitions noted above:

Accept in part: Section 10001 of the department's proposed regulations has been revised to eliminate the terms "continuing violation," "housing accommodation," "protected activity," and "co-respondent" from the list of defined terms, to eliminate the inadvertent inclusion of substantive definitions from the department's procedural regulations.

Reject in part: For clarity and brevity, the department has retained the definition of "protected basis." This definition is necessary because it provides the technical meaning of a "short-hand" term used throughout the Department's proposed regulations to refer to all the characteristics listed, or found by courts to be covered, under laws the DFEH enforces that prohibit discrimination.

C1b: The Commission notes a number of statutory references and legal terms used in the proposed regulations that are not defined or set out in full in the text of the proposed regulations. These include: "Unruh Act," "Ralph Act," "Disabled Persons Act," "EEOC," "HUD," "characteristic" (section 10002(a)(5)), "guardian ad litem" (section 10043(b)(2)), "jurisdictional" (section 10007(j)); "pre-determination" (sections 10001(f), 10024(a) and 10056(a)); "executed" (section 10024(f)(2)) and "investigative interview" (section 10026(c)).

Accept: For clarity, throughout the text of the proposed regulations, "Unruh Act" has been changed to "Unruh Civil Rights Act" or "Unruh Civil Rights Act (Civil Code, § 51);" "Ralph Act" has been changed to "Ralph Civil Rights Act" or "Ralph Civil Rights Act (Civil Code, § 51.7);" and "Disabled Persons Act" is now followed by "(Civil Code, § 54 et seq.)" in the text of the proposed regulations. In addition, "HUD," "EEOC," and "pre-determination" have been added as definitional subsections to section 10001 of the proposed regulations. Also, for clarity: section 10002(a)(5) has been revised so that "or characteristic" no longer follows "protected basis;" in section 10007(j), "jurisdictional" has been replaced with

“over which [another state agency] may have jurisdiction;” “executed” has been deleted from section 10024(f)(2), which still refers to a settlement agreement “signed” by the department, to section 10026 [now renumbered section 10027]; a subsection (b) has been added, which defines “investigative interview;” and from section 10043(b)(2), “as the minor child’s Guardian Ad Litem” has been replaced with “on behalf of the minor child.”

C1c: The Commission states that the definitions for “commission” (section 10001(c)), “department” (section 10001(i)), and “director” (section 10001(i)) are duplicative of the regulations of the Fair Employment and Housing Commission, Code of Regulations, title 2, sections 7402(f), (k) and (i), respectively. The Commission recommends setting out the entity’s title/role, unless the Department deems it necessary to repeat the existing Commission regulations.

Accept in part: “Commission” has been deleted from the definitional section of the regulations because the term “commission” does not elsewhere appear in the text of the proposed regulations.

Reject in part: The Department deems it necessary for clarity to retain the definitions of “department” and “director,” which appear throughout the text of the proposed regulations.

C1d: The Commission states that the proposed regulations allow for a broad scope of individuals who are authorized to sign a DFEH complaint. (“Authorized signature” (section 10001(b).) The Commission inquires whether Government Code section 12960(b) places the duty to sign the complaint directly on complainant.

Reject: No specific suggestion is made for revision of the proposed regulation, but the Commission infers that only the complainant should be authorized to sign his or her DFEH complaint. Indeed, the complainant is so authorized. However, recognizing that there are circumstances where a complainant will be unable to sign his or her complaint before the statute of limitations runs, and to effectuate the purposes of the act to safeguard the right of all persons to seek, obtain, and hold employment and housing without discrimination, the proposed regulation allows for specified individuals to sign a DFEH complaint on behalf of the complainant.

C1e: The Commission notes that the definitions of “complaint,” “complainant,” and “respondent” (sections 10001(d), (e) and (s), respectively) [now sections 10001(c), (d) and (t)] are limited to complaints of “discrimination,” thereby suggesting that leave violations, hate violence, and accommodation claims, for example, are not included. The Commission suggests that this interpretation can be remedied by substituting, in lieu of “discrimination,” the words: “unlawful practice” or “alleging an unlawful practice.”

Accept: Hate violence and denial of protected leave or reasonable accommodation are forms of discrimination; however, to accommodate the Commission’s comment and for clarity, “discrimination” has been replaced in

former sections 10001(d), (e), and (s) [now sections 10001(c), (d) and (t)] with “a practice made unlawful by any law the department enforces.”

Comment 2: Section 10002—Filing a Complaint of Employment

Discrimination with the Department: The Commission makes several assertions regarding section 10002 of the proposed regulations, which are addressed separately below:

C2a: The Commission notes that proposed regulation section 10002(a)(7) permits verification on “knowledge and belief” and points to Code of Civil Procedure section 2015.5, which requires personal knowledge for a declaration.

Reject in part/accept in part: No specific suggestion is made for revision of the proposed regulation, but the Commission infers that, pursuant to Code of Civil Procedure section 2015.5, verification can only be supported by personal knowledge. However, a DFEH complaint is not an instrument by which discrimination is “evidenced, established or proved.” (Code Civ. Proc., § 2015.5.) Instead, it is an instrument by which discrimination—and discriminatory motive—are alleged. A complainant cannot attest to the personal motives of another. Thus, sections 10002 (a)(7) and 10035(a)(11), have been revised to conform instead to Code of Civil Procedure section 446, which states that, “In all cases of a verification of a pleading, the affidavit of the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his or her information or belief, and as to those matters that he or she believes it to be true...” For further clarity, subsection (u), defining “verified complaint,” has been added to section 10002 of the proposed regulations.

C2b: The Commission notes that sections 10002(a)(1) and 10035(a)(1) of the proposed regulations require disclosure of a complainant's address. The Commission suggests that, under appropriate circumstances, there be a procedural mechanism in the proposed regulations for non-disclosure of a complainant's address to a respondent. As an example, the Commission states that if there are egregious allegations of harassment, service could be through the Department for case-related matters.

Accept: Sections 10002(a)(1) and 10035(a)(1) require the complainant when filing a complaint to disclose to the Department his or her address, which is information necessary to the Department for various reasons, including service of process. Sections 10009 of the proposed regulations govern the Department's drafting of an employment discrimination complaint, which ultimately will be served on a respondent. Section 10009 has been revised to address the Commission's comment with the added language: “The department may omit a complainant's address, telephone number, and e-mail address on any complaint alleging that the complainant has been subjected to violence or threats of violence including, but not limited to, sexual assault.”

C2c: The Commission points out that proposed regulation section 10002(a)(9) states that a complainant must provide “any other information that may be

required by the department," which the Commission asserts seems impermissibly vague and provides little guidance of what may be required in either a general or specific instance. Section 10035(a)(11) [now section 10035(a)(12)] states the same regarding housing discrimination complaints.

Reject: No specific suggestion is made for revision of sections 10002(a)(9) and 10035(a)(11); however, it can be inferred that the Commission recommends that this phrase be deleted, clarified or narrowed in scope. The Department has considered the Commission's comment and declines to modify sections 10002(a)(9) and 10035(a)(11). The Department has specified in these sections in significant detail the information the Department currently requires to accept a complaint of discrimination from an aggrieved party. As civil rights laws and their enforcement in California evolves, in order for the Department to require other information it deems necessary in the future—without amending its regulations—the Department included the phrase "any other information that may be required by the department." This language, taken almost verbatim from Government Code section 12960(b) (i.e., "...other information as may be required by the department") will allow the Department in the future to require information from complainants, the need for which currently is unforeseen, without amending its regulations.

C2d: The Commission suggests that the exception the Department identifies in section 10002(c) to its practice of deeming a complaint filed when the complaint is received by the Department signed ("the filing date shall be the date a DFEH office receives a signed complaint"), appears to be a matter of substantive law, and may be in conflict with Government Code section 12960(d). The exception permits the Department to file an unsigned complaint and date-stamp it received before the statute of limitations runs in the limited circumstance where a complainant (or one authorized to sign on behalf of a complainant) cannot sign a complaint for investigation before the applicable statute of limitations runs.

Reject: No specific suggestion is made for revision of the proposed regulation, however, it can be inferred that the Commission suggests that the Department delete this exception. The Department has considered the Commission's comment and declines to modify section 10002(c), which safeguards the right of all persons to seek, obtain, and hold employment without discrimination, while satisfying Government Code sections 12960(d).

Government Code section 12960(a) requires that a DFEH complaint be verified and in writing, while Government Code section 12960(d) prohibits the filing of a complaint after the expiration of one year after the alleged discriminatory act occurs. Nowhere in the statute does it say that the complaint must be signed in order to be filed, although the Department follows this practice for all but complaints filed online. As the Department has the authority to determine when a complaint is deemed filed so, too, must it have the authority to determine when an exception to this practice is necessary to safeguard the rights of a complainant who contacts the Department to file a complaint before the statute of limitations runs, but is unable to sign at that time.

Comment C3: Sections 10003 and 10036—Liberal Construction of

Complaints: The Commission suggests that regulations sections 10003 and 10036, which refer to "liberal construction" of complaints by the Department, be harmonized with the requirement that complaints include a verification under penalty of perjury, and Government Code section 12960(b), which requires a verified complaint to "set forth the particulars" of the complaint. The Commission notes that section 12993(a) provides for "liberal construction" of the FEHA, consistent with the applicable law and due process.

Reject: No specific suggestion is made for revision of sections 10003 and 10036, which already are in harmony with sections 12960(a) and 12933(a) of the Government Code. Liberal construction, as used in these regulations, refers not to an enlargement of the facts alleged by a complainant, but to the recognition of all forms of discrimination—and thus all FEHA violations—the facts alleged in a complaint, if proven true, would support.

Comment C4: Section 10004—Categories of Employment Discrimination

Complaints: The Commission notes that section 10004(a) of the proposed regulations refers to the Department not accepting complaints unless "the statute of limitation [sic] has not run." The Commission asserts that the applicability of the statute of limitations as a defense is a matter requiring a legal determination, including the review of applicable statutory exceptions and civil and Commission case law. Thus, the Commission inquires, "Is this a determination appropriately made at intake? Should there be a review process specific to statute of limitations issues?" (The Commission also notes that "statute of limitation" should read "statute of limitations" throughout the proposed regulations.)

Accept in part: The Department has revised its proposed regulations to replace "statute of limitation" with "statute of limitations" wherever the former appears throughout the text of the proposed regulations. However, no specific suggestion is made for revision of section 10004(a), entitled "Categories of Employment Discrimination Complaints." To address the Commission's concerns, the Department has instead modified sections 10007 and 10038, entitled "Intake," to include the following: "Where there is doubt about whether the statute of limitations has run, the complaint shall be taken by the department and the issue of timeliness investigated and analyzed during the investigation." (See sections 10007(i)(2) and 10038(g)(2).)

Comment C5: Section 10006—Filing a Complaint with the Department

Alleging a Violation of the Unruh Civil Rights Act, Ralph Civil Rights Act, or Disabled Persons Act: The Commission notes that proposed regulation section 10006(c) appears to be duplicative of the statutory provisions at Government Code section 12960(d)(3) and (d)(4), respectively.

Accept: The Department has deleted section 10006(c) of the proposed regulations and likewise has deleted section 10037(c) pertaining to housing discrimination complaints.

Comment C6: Section 10007 Intake: The Commission makes several assertions regarding section 10002 of the proposed regulations, which are addressed separately below:

C6a: At section 10007(b), suggest "may" in lieu of "shall."

Accept: The Department has made the suggested specified change.

C6b: At section 10007(e)(11)(B),(E), (F) suggest "rate of pay" in lieu of "salary."

Accept: The Department has made the suggested specified changes.

C6c: At section 10007(e)(11)(F)(b), suggest "orally" in lieu of "verbally."

Accept: The Department has made the suggested specified change.

C6d: At section 10007(f) suggest "may" in lieu of "shall," as there may be individuals who need particular accommodations, including sign or language interpreters, or other exigent circumstances.

Accept: The Department has made the suggested specified change.

Comment C7: Sections 10012 and 10013—Director's Complaints and Class

Complaints: The Commission notes that sections 10012(d)(I) and 10013(e)(3) refer to respondents who "employ[] a large workforce." The Commission inquires, "Is there any suggestion that larger employers would be unfairly targeted? Is the number of employees (among other factors) a valid basis for determining the initiating of a Director's or class complaint?" The Commission also directs the Department's attention to section 10028(e)(4), presumably to question similarly whether the number of employees (among other factors) is a valid basis for determining case priority. The Commission further inquires whether the Department would use specific procedures to determine potential class members and, if so, whether these procedures should be set out in the department's regulations.

Reject in part/accept in part: No specific suggestion is made for revision of sections 10012(d)(I), 10013(e)(3), 10028(e)(4). However, it can be inferred that the Commission suggests eliminating employer size as a factor. The Department asserts that employer size, when put in context, is indeed a valid consideration for determining whether to prioritize a complaint or issue a Director's or class complaint. See, for example, the factor as expressed in section 10012(d)(I), which states in full: "whether the respondent employs a large workforce, such that the anticipated remedy would impact a large number of individuals or an entire industry." Nonetheless, to address the Commission's concerns and for clarity, the Department has revised sections 10012(d)(1), 10013(e)(3), 10028(e)(4) to state: "whether the respondent employs a large workforce **that may be affected by the alleged unlawful practice**, such that the anticipated remedy would impact a large number of individuals or an entire industry."

Potential class members are determined throughout the administrative process, from information obtained at intake and through investigation. Since no

procedures uniquely specific to class complaints are utilized, none have been specified in the Department's proposed regulations.

Comment C8: Sections 10015—Disability Complaints - Special

Considerations: The Commission notes that sections 10015, 10025(d), 10050, and 10057(d) of the proposed regulations require complainants in disability cases to authorize disclosure of "all relevant medical information" and comments that doctors' offices routinely copy entire medical files when subpoenaed. The Commission inquires whether the Department has safeguards for the confidentiality of non-pertinent medical data. The Commission further inquires whether the requirement of submission of "all relevant" workers' compensation files include attorney-client privileged documents, and if so, whether the Department has protections in place for non-disclosure in appropriate circumstances.

Accept: No specific suggestion is made for revision of sections 10015, 10025(d) [now 10026(d)], 10050, and 10057(d) [now 10058(d)]. However, to accommodate the Commission and others who provided written comment regarding sections 10015 and 10050 of the proposed regulations, the Department has: (1) changed the heading from "Disability Complaints—Special Considerations" to "***Medical Information***—Special Considerations;" (2) added a subsection that makes clear that the regulation applies not only to disability discrimination complaints but to any complaint that includes allegations that require the Department to obtain and analyze medical information; (3) limited application of the required authorization to medical records and information that are "directly relevant" and "reasonably necessary to evaluate and prosecute the complaint;" (4) added safeguards to protect confidentiality of medical records and prevent disclosure during the Department's investigation, in response to a Public Records Act request, and in response to a third party subpoena if no notice to employee/consumer has been served on the complainant or, if served, when the complainant has objected to disclosure; and (5) further modified the proposed text to state that the Department will abide by complainant's attorney's requests to protect the privacy of complainant's medical information; however, if the Department is unable to obtain the medical information and records it deems reasonably necessary to investigate and/or prosecute a complainant's allegations, the Department may discontinue the investigation and close the complaint.

To accommodate the comments of the Commission and others who provided written comment regarding sections 10025(d) [now 10026(d)] and 10057(d) [now 10058(d)], the Department has changed "critical evidence" to "relevant evidence" and stricken the following sentence from the proposed text: "For a [] disability discrimination complaint, for example, critical evidence includes, but is not limited to [] all relevant medical records of the complainant."

Comment C9: Section 10019—Complaints Dual-Filed with EEOC: In proposed section 10019(s), after "at least one claim over" and before "EEOC" insert "which."

Accept: The Department has made the suggested specified change.

Comment C10: Section 10021—Service of Complaints: In Proposed Regulation section 10021(e), after "but not limited," and before "initiating" insert "to."

Accept: The Department has made the suggested specified change.

Comment C11: Section 10023—Response to the Complaint: The Commission inquires, "In practice, is 30 days sufficient for most respondents to provide a meaningful response to the DFEH complaint, or would 45 or 60 days be more appropriate to give respondent the opportunity to investigate and respond fully?"

Reject: The Department declines to revise section 10023 of the proposed regulations to accommodate the Commission's comment. Many respondents timely submit a response within 30 days of service of a complaint. Respondents who require 45 or 60 days to respond to a complaint can request an extension, which the Department typically will grant. In its many years of processing complaints, the Department has found that a great many respondents ignore any first deadline imposed and request an extension. To meet its statutory deadline to complete complaint investigation within one year, while accommodating extensions that inevitably will be requested, the department has set the response date for employment discrimination complaints at 30 days after service.

Comment C12: Section 10025—Complaint Investigation: The Commission notes that section 10025(d) of the proposed regulations refers to "all critical evidence," stating that this term is inherently vague, notwithstanding the examples provided. The Commission also points the Department's attention to its comments at section 10015 for the difficulties in determining "all relevant medical information."

Accept: Section 10025 of the proposed regulations [now section 10026] has been revised for clarity by replacing "critical" with "relevant." As stated in the Department's response to Comment C8 above, section 10015 has been revised, among other reasons, to replace "all relevant medical information" with "all **directly** relevant medical records or information." [Emphasis added.] The meaning of "relevant evidence" in section 10026 needs no further clarification. It has the same meaning as found in section 210 of the Evidence Code: "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

Comment C13: Section 10026—Investigative Subpoenas: The Commission notes that Government Code section 12963.5 provides for enforcement of

subpoenas and inquires whether there any departmental procedures for respondents or third parties to challenge a subpoena (i.e., procedures for discovery disputes, including a "meet and confer" obligation), which the Commission suggests may provide guidance to the parties and potentially help resolve such disputes.

Accept in part: The Department has made no changes to proposed regulation section 10026 (now section 10027-Investigative Subpoenas) but has instead revised proposed section 10025 [now section 10026—Complaint Investigation], which refers specifically to Government Code section 12963.5, to articulate the Department's procedure of requesting compliance in writing and/or by telephone before filing a petition to enforce its investigative discovery under Government Code section 12963.5.

Comment C14: General: The Commission asks the Department to consider that the foregoing comments, which apply to Subchapter 1 of the proposed regulations pertaining to complaints of employment discrimination, unless otherwise noted, apply to the parallel sections in Subchapter 2 pertaining to complaints of housing discrimination.

Accept: Where the Department has modified the text of its proposed regulations for employment discrimination complaints to accommodate the Commission's comments, the Department has likewise modified the text of any parallel regulations pertaining to housing discrimination complaints. Similarly, where the Department has considered and declined to modify the text of its proposed regulations for employment discrimination complaints to accommodate the Commission's comments, the Department has likewise declined to modify the text of any parallel regulations pertaining to housing discrimination complaints.

California Employment Lawyers Association (CELA) letter dated 5/26/10:

Comment D1: Section 10015—Disability Complaints - Special

Considerations: The commenter asserts that section 10015 is problematic in several respects, including leading to a potential waiver of a complainant's right to privacy in her or his medical records in subsequent litigation and increased cost to claimants. The commenter states that, as presently constructed, section 10015 poses complainants with the Hobson's choice of potentially waiving their medical privacy rights or being deemed uncooperative and having their complaint of discrimination dismissed by the Department. The commenter asserts that there is neither need nor justification for placing complainants in this position. The commenter states further that "relevance" is the wrong legal standard for the abrogation of medical privacy rights. According to the commenter, the correct legal standard is "directly relevant." (See *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516.) The commenter suggests that the Department take its cue from the EEOC's Enforcement Guidance: Disability-Related Inquiries And Medical Examinations Of Employees Under The Americans With Disabilities Act (ADA). According to the commenter, throughout that Guidance, the EEOC spells out the limits to an employer's medical inquiry. The commenter asserts that the

Department should not be in any different position than the employer in regard to its inquiry during the investigation stage. In abiding by the constraints described by the EEOC, the commenter suggests, the Department's investigators will be able to obtain the information they need to fully investigate a complaint while at the same time preserving the complainant's right to privacy.

Accept in part: The Department has considered the commenter's suggested revisions to section 10015 and, because the Department is in a very different position than an employer when it conducts statutorily mandated discrimination investigations, declines to modify the proposed regulation as suggested. However, to accommodate this comment the Department has modified section 10015 to: (1) limit application of the required authorization to medical records and information that are "directly relevant" and "reasonably necessary to evaluate and prosecute the complaint;" (2) include safeguards to protect confidentiality of medical records and prevent disclosure during the Department's investigation, in response to a Public Records Act request, and in response to a third party subpoena if no notice to employee/consumer has been served on the complainant or, if served, when the complainant has objected to disclosure; and (3) further modified the proposed text to state that the Department will abide by complainant's attorney's requests to protect the privacy of complainant's medical information; however, if the Department is unable to obtain the medical information and records it deems reasonably necessary to investigate and/or prosecute a complainant's allegations, the Department may discontinue the investigation and close the complaint.

The Legal Aid Society-Employment Law Center (LAS-ELC) letter dated 5/26/10:

Comment E1: General: The commenter notes that the Department's Notice of Proposed Rulemaking and Initial Statement of Reasons state that the proposed regulations are intended to "replace," where applicable, "controlling DFEH Directives." The commenter expresses concern that neither the proposed regulations nor the other rulemaking materials explicitly state which Directives will be superseded by the regulations and which will remain in effect. The commenter adds that, in the absence of such information, it is difficult to offer fully informed comments about the proposed regulations.

Reject: The Department declines to revise its proposed regulations to accommodate this comment. After completion of its rulemaking project, the Department will undertake the project of rescinding all DFEH Directives and, where not subject to the Administrative Practices Act and/or superseded by regulation, issue instead DFEH Internal Management Practices, which will be made available to the public on the Department's Web site.

Comment E2: General: The commenter suggests that the accessibility of the regulations would be improved by use of sub-chapters or sub-headings creating thematic groups of regulations (e.g., "Complaints," "Intake," "Investigation," and "Determinations/Conciliation," etc.).

Reject: The Department has considered and rejected this change, primarily because some regulations either would not fit squarely into a thematic group (i.e., section 10005 “Obtaining a Right-to-Sue Notice From the Department,” section 10031 “Accusation,” section 10040 “Testing”) or because some could fit comfortably within more than one group. Moreover, the proposed regulations already are broken down into two subchapters: Subchapter 1 covers Employment, Unruh Civil Rights Act, Ralph Civil Rights Act, and Disabled Persons Act Complaints; Subchapter 2 covers Housing Discrimination Complaints. Rather than risk a reader not knowing which thematic group to search to find the particular regulation he or she seeks, the regulations remain organized in the two general subchapters identified above.

Comment E3: General: The commenter further suggests that substantively parallel construction of regulatory sections, where applicable, would reduce the potentially unintended consequences of combining several Enforcement Directives and their sometimes slightly differing language into one set of regulations. The commenter notes, as an example, that certain of the factors to be considered in issuing Director’s Complaints and Class Complaints (sections 10012 and 10013, respectively) appear to be the same, but are stated in different language that may unnecessarily lead to confusion about the standards.

Reject in part/ accept in part: Combining the substance of various related Enforcement Directives, where appropriate, and replacing them with fewer duly noticed and vetted regulations governing participation in the DFEH administrative process is one of the goals of the Department’s rulemaking project. Nonetheless, the Department has revised sections 10012 and 10013 for clarity and to achieve parallel construction as recommended, where appropriate.

Comment E4: General: The commenter also suggests that the regulations would benefit from increased consistency within and across the sections, where applicable. For example, the phrases “a practice made unlawful by a *law* the department enforces” (e.g., section 10001(e)) and “a practice made unlawful by a *statute* the department enforces” (e.g., section 10001(s)) are used interchangeably throughout the proposed regulations and similar concepts are stated in wholly different language (e.g., section 10001(g) (defining “continuing violation” in part as “similar acts, at least one of which occurs inside the applicable limitations period, *which violate the FEHA*” (*emphasis added*)).

Accept: Sections 10001(e) and 10001(s) [now sections 10001(d) and (t)] have been revised so that both state “a practice made unlawful by a *law* the department enforces” [*emphasis added*]. The same revision has been made throughout the text of the Department’s proposed regulations, where appropriate. section 10001(g) has been deleted for the reason noted in response to Comment C1(a).

Comment E5: General: The commenter also remarks that several of the proposed regulations would benefit from more precise articulation of the underlying policies and procedures. For example, section 10007(a) states that

the Department shall “where appropriate, conduct an intake interview.” The commenter notes that the proposed regulation does not specify the circumstances that make an interview “appropriate,” or identify the person responsible for making the determination and the factors relevant to it. The commenter notes that, similarly, section 10007(c) sets forth procedures for scheduling intake interviews for “[i]ndividuals whose statute of limitations is about to run,” a phrase the commenter describes as vague. The commenter also states that typographical errors were noted during review of sections 10001 – 10034, and points specifically to section 10001(h), where “*complainant* of discrimination” was inadvertently written instead of “***complaint*** of discrimination.” **Accept:** Section 10007(a) has been revised for clarity to state “where it appears that the department may have jurisdiction,” in place of “where appropriate.” section 10001(h) has been deleted for the reason noted in the Department’s response to Comment C1(a).

Reject: Section 10007(a) has not been revised to identify the class of DFEH employee or employees responsible for making the decision to schedule an intake appointment. Throughout the proposed regulations, as in section 10007(a), the word “department” is used whenever it is appropriate for an action to be taken, or a decision to be made, by one or more DFEH employees of different classifications or roles. For example, the decision to schedule an intake appointment can be made by a Fair Employment and Housing Consultant, an District Administrator, a Legal Analyst, or in some circumstances the Chief of Enforcement or Chief Deputy Director, depending upon the classification of the DFEH staff member who receives a specific call or request for an appointment. Similarly, section 10007(c) has not been revised to specify any amount of time that must remain (or that must have been exhausted) before a “person whose statute of limitations is about to run,” may contact a DFEH office directly to schedule an intake appointment instead of contacting the Department’s Communication Center. The purpose of the section is not to draw a bright line indicating when it is appropriate for an aggrieved party to contact a district office directly to schedule an intake appointment; the purpose is to identify the means by which the person may make direct contact with the district office so as to discourage walk-ins.

Comment E6: General: Reasonable Accommodation and Limited English Proficiency (LEP) Policies: The commenter states that the Department should codify or clarify its Enforcement Directive Nos. 108 and 109, which set forth the Department’s policies for accommodating complainants with disabilities or complainants with limited English proficiency. The commenter remarks that the absence of such policies or procedures in the Department’s proposed regulations has both symbolic and practical significance. The commenter states further that the Department’s commitment to making enforcement of our State’s civil rights laws accessible to all complainants is one that rightly should be communicated in the regulations and notes that, given the likelihood that interested parties may find and rely upon the published regulations more readily than the Enforcement

Directives, it may be of practical consequence to codify or, at minimum, reference these Directives in the regulations themselves.

Reject: There is no symbolic meaning to the absence in this rulemaking action of the Department's procedures for accommodating persons with a disability and/or persons with limited English proficiency. The DFEH is committed to providing equal access to Department services to all members of the public—including those who seek information or training and do not wish to file a complaint—regardless of disability or English language proficiency. The absence does have practical significance, however, in that this rulemaking action is limited to adopting as regulations the Department's procedure for receiving, investigating and conciliating complaints of discrimination that arise under the laws the Department enforces. The Department's rulemaking authority does not extend to issuing regulations implementing laws to which the Department, like all other state agencies, is subject, like the ADA or the Dymally-Alatorre Bilingual Services Act (Government Code sections 7290-7299.8).

Whereas Department representatives opined at the hearing on May 26, 2010, that the originally proposed text of the regulations could be modified to include the procedures set forth in DFEH Enforcement Directives 108 and 109, upon further careful consideration it was determined that to do so would be beyond the scope of this rulemaking project. Directives 108 and 109 exceed the scope of this rulemaking project in that they encompass practices the Department has developed to comply with federal and state accessibility laws to make its services accessible to members of the public with a disability or limited English proficiency at every stage of contact with the Department—from telephone and e-mail access for technical assistance to litigation by DFEH attorneys before the FEHC and in court. The Department's rulemaking action is limited in scope to the DFEH complaint process and does not include outreach, training, technical assistance, administrative litigation or civil litigation. Because the Department's accommodation practices cover all these other areas, too, their coverage exceeds the scope of this rulemaking action. In addition, the proposed regulations commenter suggests would be duplicative of existing statutes and regulations and are therefore unnecessary. For these reasons, the text of the Department's proposed regulations has not been modified to accommodate this comment.

Comment E7: Section 10001—Definitions: The commenter makes several assertions regarding section 10001 of the proposed regulations, which are addressed separately below:

E7a: The commenter recommends that, where applicable, the regulations fully employ or cross-reference definitions of terms already codified in the FEHA or in the regulations promulgated by the Fair Employment and Housing Commission (FEHC), including section 10001(d) ("complainant") and section 10001(s) ("respondent"), both of which are defined in the FEHC regulations.

Reject: The Department drafted its definitions, presented in alphabetical order, using language consistent with that used throughout the text of its proposed regulations. As a result, although substantially the same, definitions common to both the FEHC's regulations and the DFEH's proposed regulations differ in style and scope. For example, the DFEH defines a complainant as "a "person," as that term is defined by Government Code section 12925(d), who files a complaint with the department alleging that the person has been aggrieved by a practice made unlawful by any law the department enforces." The Commission's definition, which immediately follows its definition of "person," reads as follows: " "Complainant" means the person who files a timely, verified complaint with the DFEH alleging aggrievement by an unlawful practice." The Department's definitions of complainant and respondent [now section 10001(c) and (t)] have been retained.

E7b: The commenter expresses concern that the definitions provided in subsection sections 10001(g) ("continuing violation") 10001(p) ("protected activity") are underinclusive, explains in detail the basis for its concerns, and suggests specific revisions.

Accept in part: Section 10001 of the department's proposed regulations has been revised to eliminate the terms "continuing violation," and "protected activity," from the list of defined term, to eliminate the inadvertent inclusion of substantive definitions from the department's procedural regulations.

Comment E8: Sections 10002(a), 10007(e), 10009, 10010(d), 10026(a)—

Proscribed Forms: The commenter notes that these sections each reference a "form prescribed by the department," but no forms are included for review with the rulemaking materials, which the commenter asserts limits commenters' ability to evaluate the sections fully.

Reject: Rather than including the forms themselves in its proposed regulations, the Department has articulated in the body of these section the specific information the forms contain. Proposed regulation section 10002, for example, specifies the information that must be contained in a DFEH complaint form. (Sections 10009 and 10010 describe the limited circumstances when the Department will accept a complaint for filing when it is not submitted on a DFEH complaint form.) Similarly, section 10007 specifies the information that a complainant must provide the Department on its pre-complaint questionnaire. Likewise, proposed section 10026 [now section 10027] articulates the information set forth in a DFEH subpoena.

Comment E9: Section 10003—Liberal Construction of Complaints: The commenter endorses the Department's inclusion of the FEHA's mandate to construe complaints liberally in its proposed regulations, but expresses concern that the section could be read to inadvertently limit its application. The commenter recommends that the section be modified to specify that where the facts alleged in any complaint support a claim that is not explicitly set forth in the

complaint, those claims (whether harassment, retaliation, discrimination, or any other claim) will be considered within the scope of the complaint.

Accept in part: The proposed regulation has been revised for clarity but with different language than suggested by the commenter.

Comment E10: Section 10005—Obtaining a Right-to-Sue Notice From the Department: The commenter notes that section 10005(d) provides for issuance of the Department’s “150-day” letter, as required by Government Code section 12965(b). The commenter adds that any modification the Department can make to clarify the content and meaning of these letters, to reduce confusion on the part of members of the public, would be welcome. The commenter states that her organization receives inquiries about these letters on an ongoing basis, the vast majority of which come from complainants who, misunderstanding the letter, think that the Department has closed their case.

Reject: As no specific revision to section 10005(d) of the proposed regulations has been suggested, none has been made. The commenter recommends revision of the DFEH’s “150-day” letter, not the proposed regulation.

Comment E11: Sections 10015, 10025, 10030—Disability Complaints—Special Considerations; Complaint Investigation and Receipt of Confidential Information: The commenter expresses concern about section 10015, which requires that complainants alleging disability discrimination who wish to have their complaints investigated execute a medical release authorizing the Department to obtain “all relevant medical information,” including workers’ compensation files. The commenter asserts that section 10015 constitutes an impermissible infringement of complainants’ right of privacy, while making no provision for safeguarding the confidentiality of complainants’ medical records obtained by the Department, and objects to this section targeting only complainants who allege disability discrimination. The commenter therefore recommends that this section be excised from the regulations, along with the second sentence of section 10025(d) defining “all relevant medical records of the complainant” as “critical evidence necessary” to the Department’s determination in a disability discrimination case. With regard to section 10030, the commenter recommends that the Department adopt a policy statement that all medical information received as part of an investigation will be held in strict confidence by the Department and will not be disclosed to anyone outside the Department for any reason.

Reject in part/accept in part: The Department declines to excise sections 10015 and 10025(d) from the proposed regulations and modify section 10030 as suggested. To do so would render the Department powerless to carry out its mission when successful conciliation or prosecution requires the disclosure of a complainant’s medical information. Instead, to accommodate this comment, the Department has excised section 10030 and modified section 10015 by: (1) changing the heading from “Disability Complaints—Special Considerations” to “**Medical Information**—Special Considerations:” (2) adding a subsection that makes clear that the regulation applies not only to disability discrimination

complaints but to any complaint that includes allegations that require the Department to obtain and analyze medical information; (3) adding safeguards to protect confidentiality of medical records and prevent disclosure during the Department's investigation, in response to a Public Records Act request, and in response to a third party subpoena if no notice to employee/consumer has been served on the complainant or, if served, when the complainant has objected to disclosure; and (4) adding a subsection stating that the Department will abide by complainant's attorney's requests to protect the privacy of complainant's medical information; however, if the Department is unable to obtain the medical information and records it deems reasonably necessary to investigate and/or prosecute a complainant's allegations, the Department may discontinue the investigation and close the complaint.

With regard to section 10025(d) [now 10026(d)], the Department has accommodated this comment by changing "critical evidence" to "relevant evidence" and striking the following sentence from the proposed text: "For a [] disability discrimination complaint, for example, critical evidence includes, but is not limited to [] all relevant medical records of the complainant."

Comment E12: Section 10025—Complaint Investigation: The commenter states that section 10025 does not address the circumstance in which a respondent willingly fails or refuses to respond to a complaint or to cooperate or participate in good faith in the Department's investigation. The commenter expresses concern that, in the absence of a stated policy or procedure for processing complaints in such cases, determinations may be issued in an ad hoc and inconsistent matter. The commenter therefore recommends that section 10025 be amended to include a policy statement that failure of a respondent to respond to a complaint or otherwise cooperate or participate in good faith in the Department's investigation will result in issuance of a cause finding. In the alternative, the commenter recommends a statement that non-cooperation will not result in closure of the case, which will be investigated to the extent possible notwithstanding the respondent's non-cooperation, and that such non-cooperation will result in the Department applying an adverse evidentiary inference. The commenter believes that such a standard, explicitly stated in the regulations, will incentivize respondents' good faith participation in Department investigations and further standardize Department practices.

Reject: Proposed section 10025 [now section 10026] does address a respondent's refusal to cooperate with the Department's investigation. When a respondent fails to respond, the Department serves formal discovery. If a respondent fails to comply with the Department's formal discovery, the Department files a petition in superior court to compel responses to discovery. (See Gov. Code, § 12963.5.) If the court orders a respondent to comply and the respondent refuses, the Department may initiate contempt proceedings. (See Gov. Code, § 12963.5(e).) When the Department conducts investigations, it does so as a neutral fact-finding body. The Department violates its duty as a neutral fact-finder—and violates due process rights—if, as the commenter

suggests, the Department determines that a respondent has violated the FEHA, or otherwise applies an adverse evidentiary inference, solely because a respondent refuses to cooperate with the Department's investigation.

Comment E13: Section 10028—Priority Case Processing/Case Grading

System: The commenter notes that section 10028(a) sets forth particular categories of complaints and complainants that will be prioritized for investigation, including those complainants who are terminally ill. The commenter recommends that the Department further review its case grading system and consider adopting income guidelines and amending this section to include priority processing of complaints received for investigation from unrepresented, low-income complainants who will suffer a financial hardship in the absence of timely processing of their complaints.

Reject: Considering the factors the commenter suggests would defeat the purpose of prioritizing complaints as the vast majority of complaints filed for investigation with the DFEH are filed by unrepresented low-income complainants.

Law Foundation of Silicon Valley Letter, et al., letter dated 5/26/10:

Comment F1: The commenter states that the proposed regulations give too much deference to individual consultants who may lack sufficient training and expertise.¹ The commenter categorizes its assertion into two subject areas, which are addressed separately below:

F1a: Sections 10011, 10017 and 10051—Complaints Taken For Filing Purposes Only and Effect of Prior Waiver Agreement/Release of All Claims:

The commenter states it is troubling that the proposed regulations have no objective criteria for assisting consultants in deciding whether to accept a complaint for investigation, or reject it. The commenter adds that objective, uniformly-applied criteria for accepting or rejecting complaints, or deciding which investigative techniques to implement, would increase the degree to which the Department is uniformly applying and enforcing the FEHA. The commenter expresses concern about consultants' ability to liberally construe complaints if they do not have objective criteria to follow, do not have sufficient training to be able to make the appropriate decision whether to accept or reject a complaint, and are expected to make these crucial decisions within an extremely short period of time—without the opportunity to consult with a supervisor or

¹ The commenter asserts that this is a heavy burden for consultants who have large caseloads and may be undertrained for their jobs. The commenter cites to pages 42-43 of a study conducted by UCLA-RAND Center for Law and Public Policy, *California Employment Discrimination Law and its Enforcement: The Fair Employment and Housing Act at 50* (available at http://cdn.law.ucla.edu/SiteCollectionDocuments/Centers%20and%20Programs/FEHA%20Study_FINAL.pdf) to support this assertion. The Department is very familiar with this study, which it invited, and for which it furnished the 1997-2008 raw data that was analyzed. More than one commenter has relied on this study to support concerns about investigators' experience and training, which the Department is appropriately addressing outside this rulemaking process. The Department did not rely on this study in proposing the adoption of its regulations.

experienced attorney. The commenter notes that plaintiffs' advocates have raised concerns about the thoroughness of DFEH staff training and whether consultants have a comprehensive understanding of possible jurisdictional complaints, especially when developing areas of the law, such as neighbor on neighbor racial harassment or difficult areas of the law such as landlord exploitation of a tenant's mental disability, are at issue. Of additional concern to the commenter is the fact that **section 10011** allows the Department to reject certain allegations and accept a complaint for filing purposes only, but provides no grounds or criteria for making this decision. The commenter asserts that, since complaints must be liberally construed, the grounds for rejecting a complaint or allegation should be explicit in the regulations and should be very narrow, applying only in those instances, for example, in which no possible jurisdiction could apply. The commenter notes lastly that **sections 10017** and **10051** allow the DFEH to reject or close a case where the claimant has previously waived his right to file, but does not include standards as to what constitutes a valid waiver. The commenter asserts that the regulations should be clearer on this point to provide guidance to the individual consultants charged with executing them.

Reject in part/accept in part: The purpose of the proposed regulations is to provide the public clear rules of general application for participation in the DFEH administrative process. Objective, uniformly-applied criteria for accepting or rejecting complaints—namely, that the conduct alleged, if proven, would be a violation of the laws the department enforces; the statute of limitations has not run; and each named respondent or co-respondent is an entity or person over whom the department has jurisdiction—are provided at section 10004(a) and reiterated throughout the text. Supervisors and DFEH staff counsel are, in fact, available to assist consultants in determining whether these criteria are met. The proposed regulations also provide a formal mechanism for challenging the Department's determination to reject a complaint or close a case. (See sections 10033 and 10065.) However, issues of training and competence of DFEH staff are well beyond the scope of this rulemaking process. Therefore, the proposed regulations have not been revised to accommodate these concerns. These issues have been noted, however, and are being addressed appropriately outside the rulemaking process.

To address the commenter's specific concern regarding **section 10011**, the proposed regulation has been modified at section 10011(a) to state, "The department may only reject an allegation if it is clear that the statute of limitations has run and/or that the allegation, if proven, would not constitute a violation of the FEHA."

To address the commenter's specific concern regarding **sections 10017** and **10051**, those sections have been amended to include a non-exhaustive list of factors that must be evaluated by the Department to determine whether a complainant has validly waived his or her right to file a complaint with the department.

F1b(1): Sections 10025, 10057, 10026, and 10058- Complaint

Investigation/Investigative Subpoenas: The commenter notes that sections 10025, 10057, 10026, and 10058 provide general guidance on how to investigate a complaint, but do not provide objective criteria with respect to when certain investigative techniques can and should be used. The commenter adds that deference generally should be given to consultants to plan and run their own investigations. The commenter states, however, that the lack of objectivity and direction is troubling given the consultants' perceived overall lack of training and extremely high caseloads, which may encourage them to create shortcuts to closing a case or recommending accusation. The commenter asserts that certain consultants may decide to engage in different types of discovery than other consultants in similar cases, and choose to seek different methods of enforcing a party's responsibility to respond to discovery. The commenter states that these differences in tactics may result in different results in cases that are otherwise similar to each other, resulting in a patchy enforcement of FEHA throughout the state.

Reject: No specific suggestion is made for revision of proposed regulation sections 10025, 10057, 10026, and 10058. As stated previously, the purpose of the Department's proposed regulations is to provide the public clear rules of general application for participation in the DFEH administrative process. The Department has discretion to determine which investigative tools to use for a particular case, as well as whether to issue formal discovery and/or to petition the court to compel a noncompliant respondent to comply. These determinations are made by the Department on a case by case basis with supervisors and staff counsel available to strategize as necessary. However, issues of training, competence of DFEH staff and consistency in case processing are well beyond the scope of this rulemaking process. Therefore, the proposed regulations have not been revised to accommodate these concerns. These issues have been noted, however, and are being addressed appropriately outside the rulemaking process.

F1b(2): Sections 10028 and 10060—Priority Case Processing/Case Grading

System: The commenter expresses concerns about sections 10028 and 10060 of the proposed regulations, which outline the Department's priority case processing/case grading system. The commenter agrees that there are systemic issues that deserve priority processing and understands that the Department is faced with balancing a demand for its services that exceeds its capacity to provide them. However, the commenter fears that a large number of complaints will be dismissed prematurely simply due to processing pressures and because they fall through the cracks on account of higher-priority cases being pushed to the front of the queue. The commenter therefore suggests that these sections include guarantees that non-priority "standard" cases will receive a fair investigation, assessment and resolution, particularly given the commenter's concerns about training and caseloads.

Accept: Sections 10028 and 10060 of the proposed regulations have been modified to accommodate this comment. Sections 10028(c) and 10060(c), originally stated: “The department shall preliminarily designate all other employment discrimination complaints filed for investigation as standard complaints.” As modified, these sections now state: “The department shall preliminarily designate all other employment discrimination complaints filed for investigation as standard complaints, ***which the department shall investigate.***”

Comment F2: General: Reasonable Accommodation Policy: The commenter asserts that the proposed regulations should include a policy under which complainants with disabilities can request reasonable accommodations of intake and other procedures. The commenter makes two specific assertions related to this comment, which are addressed separately below:

F2a: The commenter notes that regulations implementing Title II of the Americans with Disabilities Act, 42 U.S.C. section 12131, et seq., require the Department to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability. The commenter recommends that the DFEH adopt a regulation outlining a general reasonable accommodation policy for use at any time throughout the complaint process, stating the following:

Section 100xx: Reasonable Accommodation Policy

Complainants with disabilities may request a reasonable accommodation of any DFEH procedure if necessary for the complainant to have equal access to the Department’s services. The Department shall grant such a request unless the accommodation requested would either create an undue burden or fundamental alteration of the Department’s program. The Department shall engage in an interactive process with the complainant in the event that the department determines that a necessary accommodation would create an undue burden or fundamental alteration, in order to provide an alternative accommodation which would allow the complainant to have equal access to the Department’s services.

Reject: As the commenter notes, the ADA and its implementing regulations require the Department to modify its procedures when necessary to accommodate persons with a disability and to avoid discrimination. In compliance therewith, the DFEH has established a policy to ensure that members of the public with a disability have equal access to the Department’s services. The commenter’s proposed regulation is duplicative of existing statutes and regulations and is unnecessary. Therefore, the text of the Department’s proposed regulations has not been changed to include the commenter’s proposed regulation.

F2b: The commenter suggests that the DFEH should adopt regulations enunciating a reasonable accommodation policy for situations unique to the complaint intake process. The commenter states that the Department's current intake procedures are riddled with hurdles for complainants with disabilities. The commenter points specifically to sections 10007 and 10038 of the proposed regulations, which require complainants alleging employment or housing discrimination to provide certain information regarding the alleged discrimination prior to the intake interview "on a form prescribed by the department" (also known as a Pre-Complaint Questionnaire or "PCQ.") The commenter notes that many people with disabilities cannot manually fill out forms and may need to dictate their response or use a computer or other assistive device. The commenter adds that although the Department's PCQ is available on its Web site, currently it is only available in PDF format, which is completely inaccessible to people with vision disabilities who rely on screen readers—which cannot read PDF files—to access documents. The commenter states that the DFEH must overcome these barriers by making its intake forms available in formats that would allow people to fill them out electronically and by creating forms that can be read using a screen reader. The commenter adds that the DFEH alternatively should grant accommodations requiring an investigator to allow a complainant to dictate the information required by the Pre-Complaint Questionnaire immediately prior to an intake interview. The commenter notes that, in addition, there may be circumstances in which an accommodation may be appropriate to allow a guardian or other legal representative to file a complaint on behalf of an individual with a disability. The commenter asserts that new paragraphs are required as follows in sections 10007 and 10038, in order to make sure that individual needs for reasonable accommodations are considered throughout the intake process:

Section 10007x/10038x: Complainants with disabilities may request reasonable accommodations of these intake procedures if necessary for the complainant to have equal access to the department's services. The department shall grant such a request unless the accommodation requested would either create an undue burden or fundamentally alter the nature of the program. The department shall engage in an interactive process with the complainant in the event that the department determines that a necessary accommodation would create an undue burden or fundamental alteration, in order to provide an alternative accommodation which would allow the complainant to have equal access to the complaint process.

Reject: The DFEH is required by existing state and federal law and regulations to provide reasonable accommodations to persons with disabilities to ensure equal access to its services. This requirement includes ensuring that complainants with disabilities have equal access to the Department's intake procedures. In compliance therewith, the DFEH already has in place the policy

the commenter suggests although, admittedly, in terms of Web site accessibility, the implementation of that policy requires revision. With regard to revising and fully implementing its current policy, the Department is in full agreement. It is the commenter's recommendation that the Department issue an implementing regulation that the Department must reject. The commenter's proposed regulation is both duplicative of existing laws and regulations and is unnecessary. Therefore, the text of the Department's proposed regulations has not been changed to include the commenter's proposed regulation.

Comment F3: Sections 10015 and 10050—Disability Complaints: Special Considerations: The commenter asserts that sections 10015 and 10050 should require a more narrow disclosure of a disabled complainant's medical records. The commenter notes that courts permit disclosure of information protected by a consumer's right to privacy only where they are convinced that the information is "directly relevant" to a cause of action or offense, and that it is essential to determining the truth of the matters in dispute. (See *Britt v. Superior Court* (1978) 20 Cal.3d 844, 859-862.) The commenter suggests that one possible solution would be the substitution of the following language for the language in sections 10015 and 10050:

Complainants alleging disability discrimination in employment (or housing) shall authorize the department in writing to request and obtain copies of those records or information that are reasonably necessary to prosecute the disability discrimination complaint. The department shall advise them of which records are reasonably necessary and the basis for the determination that the records are necessary, and of their right to keep the documents confidential. The department shall keep such information confidential unless disclosure of the information is necessary for further prosecution after an accusation has been issued, and then release it only with the consent of the individual complainant.

Reject in part/accept in part: The Department declines to modify the text of sections 10015 and 10050 as proposed. However, to accommodate this written comment regarding sections 10015 and 10050 of the proposed regulations, the Department has: (1) limited application of the required authorization to medical records and information that are "directly relevant" and "reasonably necessary to evaluate and prosecute the complaint;" (2) added safeguards to protect confidentiality of medical records and prevent disclosure during the Department's investigation, in response to a Public Records Act request, and in response to a third party subpoena if no notice to employee/consumer has been served on the complainant or, if served, when the complainant has objected to disclosure; and (3) further modified the proposed text to state that the Department will abide by complainant's attorney's requests to protect the privacy of complainant's medical information; however, if the Department is unable to obtain the medical information and records it deems reasonably necessary to investigate and/or

prosecute a complainant's allegations, the Department may discontinue the investigation and close the complaint.

Comment F4: Sections 10030 and 10062—Receipt of Confidential

Information: The commenter states that sections 10030 and 10062 violate complainants' right to privacy and should include safeguards to ensure that personal information provided by or about complaints is kept confidential. The commenter suggests that the following language could be substituted for the language in sections 10030(a) and 10062(a) to allow the Department flexibility to use and disclose information necessary to investigate complaints:

Information such as medical records or other personally identifying information that is protected under state or federal privacy laws shall be deemed confidential and disclosed by the department only when reasonably necessary to further investigation or prosecution of a complaint. The department shall notify complainants during the intake process that information the department receives in the course of reviewing, investigating or prosecuting a complaint may be disclosed to third parties as reasonably necessary. The department shall issue complainants a form allowing complainants to request an agreement of confidentiality during the intake process. The department shall allow complainants who are unable to complete such (sic) the form due to a disability to request an agreement of confidentiality via alternate methods. The department shall inform complainants that it maintains discretion to enter into agreements of confidentiality based on the criteria in 10030(b) or 10062(b).

Reject in part/accept in part: The Department declines to modify the text of section 10030 and 10062 as proposed. To accommodate this comment, the Department has instead stricken sections 10030 and 10062 from the proposed regulations and modified the text of sections 10015 and 10050 to include safeguards to protect confidentiality of medical records and prevent disclosure during the Department's investigation. Further modification to sections 10015 and 10050 ensure that, if an accusation is issued, all directly relevant medical records or information reasonably necessary to prosecute an accusation or civil complaint may be disclosed by the Department when disclosure is necessary to further prosecution and/or settlement.

Comment F5: General: Limited English Proficiency (LEP) Access Plan:

The commenter states that the DFEH, a recipient of federal financial assistance and a state agency, must utilize methods of administration that ensure that persons with limited English proficiency (LEP) are able to file complaints and enforce their fair housing, employment and related civil rights through the Department. The commenter states that federal and state laws require that the Department provide meaningful language access to all persons in California.

The commenter asserts that the Department must promulgate regulations implementing its duties under these federal and state laws and should, in order to carry out its mandate, establish a meaningful regulatory process for working with LEP complainants. The commenter acknowledges that the Department's Enforcement Division Directive Number 108, entitled "Provision of Services to Individuals who are Limited English Proficient," is the main document providing guidance on language accessibility within the Department, which the commenter says is inadequate. The commenter notes that advocates have raised concerns about the Department's failure to ensure in some cases appropriate, competent, qualified interpreters during investigation and resolution of complaints. The commenter states that the regulations must include provisions for language access, and should include a section establishing DFEH procedures for providing interpretation and translation for LEP persons. The commenter suggests the following regulations:

The department shall take all steps necessary to provide meaningful language access. An LEP includes anyone who does not speak English as their primary language and who have a limited ability to read, write, speak, or understand English. When in contact with an LEP person, department staff will use a qualified interpreter to conduct intake, ongoing investigation, conciliation, and any other communication. Written complaints will be accepted in the individual's primary language. Further, the department will make vital documents available in the most common languages of LEP speakers in California. Throughout the complaint process, department staff will refer to the department's language access plan for names of qualified bilingual staff, a list of translated documents, and other provisions for providing language access. The plan can be found at [Insert locations]. The language access plan will be reviewed, and updated if necessary, on an annual basis.

The commenter further asserts that some points of contact will require interpretation or translation, and recommends that sections 10002 and 10035 (Filing a Complaint of Employment or Housing Discrimination); sections 10007 and 10038 (Intake); sections 10008 and 10039 (Priority Intake); and sections 10024 and 10056 (Conciliation), include a clause stating that LEP persons will be provided with language assistance in accordance with the Department's language access plan. The commenter proposes, for example, adding the following language:

Sections 10002x/10035x: *The complaint will be accepted in the complainant's primary language. The department will make complaint forms available in languages spoken by a substantial portion of the state's population.*

Sections 10007x/10038x and Sections 10008x/10039x: *The department staff will determine the individual's primary language where the individual has limited English proficiency and immediately engage appropriate translation services, in accordance with the department's language access plan.*

Sections 10024x/10056x: *Appropriate translation will be provided where one or more of the parties are LEP.*

Reject: The DFEH is required by existing state and federal law and regulations to provide meaningful access to services to members of the public who are not proficient in English. In compliance therewith, the DFEH already has in place the plan the commenter suggests. With regard to revising and implementing its plan to the fullest extent possible under current budgetary constraints, the Department is in full agreement. It is the commenter's recommendation that the Department promulgate regulations implementing the laws to which the DFEH is subject that the Department must reject. The commenter's proposed regulations are both duplicative of existing laws and regulations and unnecessary. Therefore, the text of the Department's proposed regulations has not been modified to include the regulations the commenter proposes.

Comment F6: Sections 10009 and 10041—Drafting Complaints Filed For Investigation: The commenter remarks that sections 10009 and 10041 place all responsibility for drafting employment and housing discrimination complaints with the Department and give little or no leeway for the complainants, on their own or through the assistance of an attorney or advocate, to shape and frame their own complaints. The commenter states that the proposed regulations put drafting of all complaints squarely in the hands of consultants, whom the commenter states may not have the necessary expertise to draft a complaint with the nuances necessary to bring to light the true allegations of a complainant. The commenter adds that the proposed regulations also do not allow for a complainant to amend the complaint, or take into consideration that a complainant may be represented by an attorney or an advocate who may have different ideas about how to frame the complaint, which the commenter states should be taken into account during the drafting process. The commenter also notes that the proposed regulations do not call for the Department to send a copy of the complaint to an attorney or advocate for approval. The commenter asserts that the proposed regulations should make clear that, when a complainant is represented, all communications—including those regarding the finalization of the complaint—should be directed to the representative and not the complainant personally. The commenter recommends the following additions to the regulations:

Section 100xx: Complainants Represented by Attorneys or Advocates. *When a Complainant is represented by an attorney or advocate in his or her complaint of housing or employment discrimination, all communications from DFEH to the complainant*

shall be made to the attorney or advocate, and not directly to the represented complainant.

Sections 10009/10041:

If the complainant is represented by an attorney or advocate, the draft complaint shall be sent to the attorney or advocate by U.S. Mail, facsimile transmission, email or other electronic means. Within five (5) days upon receipt of the draft complaint, the complainant or his attorney or advocate shall either submit the signed complaint or amendments to the draft complaint, unless the complaint requires additional time as a reasonable accommodation of his or her disabilities.

Accept in part/reject in part: The Department has modified sections 10009 and 10041 of its proposed regulations, but with different language than suggested by the commenter. The Department declines to include a regulation prohibiting the Department from contacting a complainant who is represented by an attorney or advocate. Instead, the Department has modified the text of sections 10009, 10041, 10024 and 10056 to ensure that for the drafting, conciliation and mediation of complaints, the Department contacts a complainant's attorney or advocacy organization whenever a complainant is represented.

Comment F7: The commenter states that the proposed regulations should be clearer about situations in which intake procedures can be modified. The commenter makes two specific assertions related to this comment, which are addressed separately below:

F7a: Sections 10002(c) and 10035(d)—Filing a Complaint of

Employment/Housing Discrimination: The commenter states that language should be added to sections 10002 and 10035 specifying objective criteria for identifying the circumstances when the Department will accept an unsigned complaint for filing, as well as identify the Department representative who will make the decision to file an unsigned complaint.

Reject: No specific language has been suggested to revise sections 10002(c) and 10035(d) of the Department's proposed regulations. The regulation states that the Department may accept an unsigned complaint if the complainant is unable to sign before the statute of limitations runs. The Department has discretion to determine when circumstances warrant the application of this exception. The Department declines to limit its discretion—and the broad scope of protection afforded aggrieved parties under the FEHA—by articulating specific circumstances when this exception would apply. The department also declines to identify a particular Department representative who will make this decision. Throughout the proposed regulations, as in sections 10002 and 10035, the word “department” is used whenever it is appropriate for an action to be taken, or a decision to be made, by one or more DFEH employees of different classifications

or roles. For example, the decision to accept an unsigned complaint when the statute of limitations is about to run can be made by a Fair Employment and Housing Consultant, an District Administrator, a Legal Analyst, or in some circumstances the Chief of Enforcement or Chief Deputy Director, depending upon the classification of the DFEH staff member who receives a specific request for an exception. For these reasons, the Department has made no modifications to the proposed regulations to accommodate this comment.

F7b: Sections 10010 and 10042—Written Statement or Correspondence as Complaint: The commenter states that language should be added to sections 10010 and 10042 that outlines clear, objective criteria to determine when a complaint will be accepted for filing in a format other than a DFEH complaint form, and whether the decision to accept a complaint in an alternate format will be left to an individual consultant or other DFEH representative.

Reject: No specific suggestion is made for revision of sections 10010 and 10042 of the proposed regulations. The Department has discretion to determine when a complaint will be accepted for filing in an alternate format. The Department declines to limit its discretion—and the broad scope of protection afforded aggrieved parties under the FEHA—by articulating specific circumstances when this exception would apply. Throughout the proposed regulations, as in sections 10035(a) and 10042, the word “department” is used whenever it is appropriate for an action to be taken, or a decision to be made, by one or more DFEH employees of different classifications or roles. For example, the decision to accept a complaint in an alternate format when the statute of limitations is about to run can be made by a Fair Employment and Housing Consultant, an District Administrator, a Legal Analyst, or in some circumstances the Chief of Enforcement or Chief Deputy Director, depending upon the classification of the DFEH staff member who receives a specific call or request for an exception. For these reasons, no changes have been made to accommodate this comment.

Comment F8: Sections 10008 and 10039—Priority Intake: The commenter recommends that, given the time it may take to turn around a complaint and incorporate necessary amendments, language should be added to sections 10008 and 10039 stating that any complaint for which the statute of limitations will expire in 30 days or less will be subject to priority intake. The commenter also suggests that the Department add language to these sections identifying the DFEH representative who will make the decision to subject a complaint to priority intake, and a timeline of no more than 24 hours for making the decision.

Accept in part/reject in part: The Department has modified the text of sections 10008 and 10039 to articulate that persons whose statute of limitations will run in thirty (30) days or less may be given priority for the purpose of scheduling an intake appointment. The Department declines to identify a particular Department representative who will make this decision, however. Throughout the proposed regulations, as stated previously, the word “department” is used whenever it is appropriate for an action to be taken, or a decision to be made, by one or more DFEH employees of different classifications or roles, as circumstances warrant.

The Department further declines to constrain its operations by imposing upon itself a blanket rule that requires a decision be made within 24 hours.

Comment F9: Sections 10024 and 10056—Conciliation: The commenter expresses reservations about the pre-determination settlement process authorized by sections 10024(b) and 10056(b), especially when complainants and respondents are not represented by counsel who can advise the parties regarding the value of the claim. The commenter inquires, “If no investigation has been done, what criteria are consultants using to value a complainant’s claim?” The commenter asserts that unrepresented complainants, who because they are uneducated or have limited English-speaking ability, or for other reasons, have no way of knowing how to value their claims, especially when the claim is based entirely upon emotional distress. The commenter states knowing from anecdotal evidence that unrepresented complainants often feel pressured by consultants to accept conciliation agreements on terms that they find unfair or inadequate. The commenter asserts that this pressure undermines the Department’s goal of voluntary settlement and leaves complainants feeling like they did not have the opportunity to have their complaint fairly and impartially investigated and brought to a fair settlement or litigation. The commenter asserts that the DFEH rushes to conciliate cases, which the commenter states may partially account for what the commenter terms a dramatic difference between DFEH and EEOC settlement amounts. According to the commenter, this difference indicates that there is an unequal system of civil rights enforcement in California. The commenter also expresses concerns about the confidentiality provision in sections 10024 and 10056. The commenter states that it is not clear why settlements arising out of any conciliation process facilitated by the DFEH must be confidential. The commenter agrees that discussions during the mediation process are confidential, but adds that the final settlement document need not be confidential and states there should be standards for determining when it should be confidential.

Reject: No specific suggestion is made for revision of sections 10024 and 10056 of the proposed regulations and therefore none is made to accommodate this comment.

The Department added sections 10025 and 10057, and revised sections 10024 and 10056, to reflect the inauguration of the Department’s Mediation Division in May 2010. From May through December 2010, the Department’s Mediation Division achieved monetary settlements totaling approximately \$950,000. DFEH Mediations are conducted by neutrals, most of whom are experienced attorneys, who have undergone certified mediation training. The Department offers pre-investigation mediation in lieu of the Enforcement Division’s pre-determination settlement discussions. Mediation offered post-investigation replaces conciliation conducted by the Enforcement Division. Mediated settlement agreements entered into pre-accusation are not signed by the Department (so are not public records) and are confidential to incentivize pre-litigation resolution.

Comment F10: Sections 10013 and 10047—Class Complaints: The commenter notes that sections 10013 and 10047 provide direction on how the Department handles class complaints for employment and housing. The commenter points out, however, that these sections do not indicate whether the statute of limitations for unnamed class members tolls during the investigative period. The commenter states that the proposed regulations should include direction on how the FEHA's tolling rules apply to unnamed class members. The commenter recommends that the statute of limitations for unnamed class members toll in the same way that it tolls for individual complainants.

Reject: The requested modification to the Department's procedural regulations would decide a substantive right, which the Department lacks authority to decide. As such, the Department declines to modify sections 10013 and 10047 to accommodate this comment.

Comment F11: General: The commenter states that copies of all forms and manuals referenced in the proposed regulations should be part of the regulatory process.

Reject: Rather than including the forms themselves in its proposed regulations, the Department has articulated in the body of its regulations the specific information the specified forms contain. Proposed regulation section 10002, for example, specifies the information that must be contained in a DFEH complaint form. Similarly, section 10007 specifies the information that a complainant must provide the Department on its pre-complaint questionnaire. Likewise, proposed section 10026 [now section 10027] articulates the information set forth in a DFEH subpoena. Articulating the information to be elicited rather than the forms themselves provides for greater flexibility in the use of future electronic filing or other technological advances, and avoids unnecessary rulemaking whenever the forms are amended.

Housing Rights Center (HRC) letter dated 5/26/10:

Comment G1: General: The commenter states that regardless what regulations are eventually adopted, Department staff require training to ensure consistent knowledge of the law and how to implement the regulations. The commenter remarks that it has been her experience that department staff, from intake staff to consultants to department attorneys, vary significantly as to their understanding of the laws they are charged with enforcing.

Reject: As no specific suggestion is made for revision of the Department's proposed procedural regulations, no changes have been made to accommodate this comment. The commenters concerns have been noted, however, and are being addressed appropriately outside the rulemaking process.

Comment G2: General—Limited English Proficiency (LEP) Policy: The commenter notes that the proposed regulations do not address the needs of individuals with Limited English Proficiency (LEP) or individuals with disabilities. The commenter states that the regulations should contain guidance and direction

as to how the department will meet the needs of these populations through the complaint process - from intake to case closure, whether via exceptions to normal procedure, the provision of reasonable accommodation, or otherwise. The commenter adds that Department staff will also require training on these topics.

Reject: No specific suggestion is made for revision of the Department's proposed procedural regulations to accommodate this comment. For the reasons explained in the Department's response to preceding Comments E6, F2, and F5, the Department has not included its policy for providing equal access to members of the public with disabilities or limited English proficiency in its proposed procedural regulations.

Comment G3: Section 10001—Definitions: The commenter states that the definition of "complainant" should expressly recognize the standing of fair housing organizations. The commenter suggests including in this section a definition of "person" that comports with Government Code section 12925(d).

Accept: The Department has revised section 10001 to accommodate this comment.

Comment G4: Section 10035(a)—Filing a Complaint of Housing

Discrimination: The commenter notes that use of the term "individual" fails to recognize the standing of organizations under Government Code section 12980(a) (which utilizes the term aggrieved "person," which in turn is defined pursuant to Government Code section 12925(d) as including organizations and other entities). The commenter therefore suggests changing "individual" to "person" for purposes of this regulatory section.

Accept: The Department has revised section 10035 to accommodate this comment.

Comment G5: Sections 10035(a) and 10038(c)(e) and (t)—Filing a

Complaint of Housing Discrimination and Intake: The commenter states that Government Code section 12980(a) requests only that a complaint be verified and in writing. The commenter notes that the Department has put into place an intake and complaint process, including required use of department-prescribed forms, which the commenter asserts creates delays, is inaccessible to many, and is overly burdensome to the point of frustrating complainants and discouraging complaints. The commenter states that the Department needs to adopt a process that is more flexible, accessible and accommodating, and that process needs to be reflected in the Department's regulations. The commenter adds that eliminating the Department's requirement that complaints be lodged using a prescribed form would be a good start. The commenter states that moving towards online and in-person complaint filing and appointment setting systems would also go far in improving the process. The commenter adds that other governmental agencies utilize more streamlined systems and inquires why the department cannot.

Reject: As no specific suggestion is made for revision of sections 10035(a) and 10038(c)(e) and (t) (except perhaps wholesale elimination of the Department's complaint form, which the Department rejects), no changes have been made to accommodate this comment. The Department has been authorized by the Legislature to adopt regulations to carry out its duties and functions in enforcing the FEHA, which is precisely what the Department has undertaken with this rulemaking action. This rulemaking action is among several innovations that the Department has put in place over the last several years to streamline the Department's processes and improve its provision of services to the public. More innovations, including increased availability of online services, are on the way.

Comment G6: Sections 10035(a) and 10042—Filing a Complaint of Housing Discrimination and Written Correspondence as Complaint: The commenter notes that sections 10035(a) and 10042 provide for "exceptions" from normal procedure when the statute of limitations is about to run. The commenter states that these regulations need to clarify which DFEH representative will determine when an exception will be granted and the criteria that will be relied upon to make the determination.

Reject: Throughout the proposed regulations, as in sections 100035(a) and 10042, the word "department" is used whenever it is appropriate for an action to be taken, or a decision to be made, by one or more DFEH employees of different classifications or roles. For example, the decision to accept a complaint in an alternate format when the statute of limitations is about to run can be made by a Fair Employment and Housing Consultant, an District Administrator, a Legal Analyst, or in some circumstances the Chief of Enforcement or Chief Deputy Director, depending upon the classification of the DFEH staff member who receives a specific call or request for an exception. The Department declines to limit its broad discretion by specifying a particular DFEH representative charged with this decision. The Department also has discretion to determine when it will accept a complaint in an alternate format, and declines to limit this discretion by articulating specific criteria that will be considered to grant or deny an exception.

Comment G7: Sections 10036 and 10038(g)—Liberal Construction of Complaint and Intake: The commenter states that, with regard to the "liberal construction" of complaints, there is a need for training of department staff. The commenter adds that it has not been the experience of those at her organization that complaints are "liberally" construed. According the commenter, construction is very inconsistent and directly depends on the competency of the department staff handling the complaint.

Reject: As no specific suggestion is made for revision of sections 10035(a) and 10042 of the proposed regulations, no changes have been made to accommodate this comment. The commenters concerns have been noted, however, and are being addressed appropriately outside the rulemaking process.

Comment G8: Section 10038—Intake: The commenter remarks that section 10038 jumps from section 10038(c) to section 10038(e) and is missing a subsection (d).

Accept: Section 10038 has been revised to correct this in advertent omission.

Comment G9: Sections 10039 and 10060—Priority Intake and Priority Case Processing/Case Grading System: The commenter inquires, “What, in practice, will “prioritizing” an intake/case mean?” The commenter adds that in her organization’s experience, the department is incapable of responding quickly enough to deal with a pending eviction or loss of housing intake/complaint—even when put on notice and specifically asked to prioritize such a matter. Also, as noted above, the commenter states that it has been her experience that individuals calling the department with urgent “priority” issues involving a discrimination claim have been referred out without the intake/complaint being processed. The commenter adds that if the department is not going to be able to process priority intakes/complaints in a meaningful way (i.e., in a manner likely to prevent the imminent loss of housing or housing opportunity), that fact should be reflected in the regulations so as not to raise community expectations.

Reject: The Department is able to process priority intakes/complaints in a meaningful way (i.e., in a manner likely to prevent the imminent loss of housing or housing opportunity). As such, no changes have been made to accommodate this comment.

Comment G10: Section 10039—Priority Intake: The commenter suggests that homeless individuals and persons at risk of institutionalization should be included as prioritized complainants.

Accept: Section 10039 has been revised to include homeless individuals and persons at risk of institutionalization as priority complainants.

Comment G11: Section 10041—Drafting Housing Discrimination

Complaints: The commenter states again that it has not been her organization’s experience that complaints are liberally construed. The commenter asserts that, in the drafting process, to which this section applies, it has been her experience that members of her organization have had to go back to the department repeatedly to ask that complaints be re-drafted.

Reject: As no specific suggestion is made for revision of sections 10041 of the proposed regulations, no changes have been made to accommodate this comment. The commenters concerns have been noted, however, and are being addressed appropriately outside the rulemaking process.

Comment G12: Section 10050—Disability Complaints—Special

Considerations: The commenter asserts that this section is overly broad, particularly in light of the confidentiality provisions at section 10062, which the commenter says are inadequate. The commenter agrees that a complainant may be required to authorize the Department to obtain information and records reasonably necessary to evaluate and prosecute the complainant’s disability

discrimination complaint. However, the commenter asserts that the regulations should include a provision stating that such documents are presumed confidential and are treated as such. The commenter also states that this section is overly punitive. According to the commenter, because persons with disabilities frequently have difficulty complying with strict deadlines, implementation of a one-strike rule for failure to provide written authorization by a date prescribed by the department will result in the unfair and premature closure of complaints. The commenter asserts that compliance with the Department's timelines should be subject to reasonable accommodation and good cause exceptions.

Accept in part/Reject in part: The Department has revised section 10050 to address this comment, but with different language than the commenter suggests. section 10050 of the proposed regulations has been revised to: (1) limit application of the required authorization to medical records and information that are “directly relevant” and “reasonably necessary to evaluate and prosecute the complaint;” (2) added safeguards to protect confidentiality of medical records and prevent disclosure during the Department’s investigation, in response to a Public Records Act request, and in response to a third party subpoena if no notice to employee/consumer has been served on the complainant or, if served, when the complainant has objected to disclosure; and (3) further modified the proposed text to state that the Department will abide by complainant’s attorney’s requests to protect the privacy of complainant’s medical information; however, if the Department is unable to obtain the medical information and records it deems reasonably necessary to investigate and/or prosecute a complainant’s allegations, the Department may discontinue the investigation and close the complaint.

Comment G13: Section 10057—Complaint Investigation: The commenter states that the decision whether to issue subpoenas, interrogatories and requests for production of records seems to be completely within the department's discretion. The commenter adds that the decision to petition the court in response to a respondent’s failure to respond to subpoenas, interrogatories and requests for production is similarly discretionary. The commenter suggests that the department adopt objective criteria and guidelines to ensure cases are treated in a consistent manner, and that cases are not and closed without a full and fair investigation.

Reject: As the commenter correctly asserts, the Department has discretion to determine whether to issue formal discovery in an administrative investigation and whether to petition the court to compel a noncompliant respondent to comply. These determinations are made by the Department on a case by case basis with the consultation of supervisors and attorneys. Limiting the Department’s discretion by "standardizing" these processes in a regulatory framework would be counter productive overly burdensome. As such, the Department declines to modify section 10057 [now section 10058] to accommodate this comment.

Comment G14: Section 10062—Receipt of Confidential Information: The commenter notes that this section is confusing. The commenter identifies two categories of "confidential information" that the department may obtain under proposed section 10062: That which is confidential by agreement of the parties (Gov. Code, § 12932(b)), and that which is confidential by definition (Evid. Code, §1040). The commenter states that medical records naturally fall in the second category, and as noted in a previous comment should be presumed confidential and treated as such. The commenter also notes that, with regard to records characterized as confidential by agreement of the parties, it has been the commenter's experience that the records have been released by the department in response to public record act requests and the commenter also has been informed that the department will release such records in response to subpoenas. The commenter recommends that guidelines on how to handle confidential information be adequately and accurately set out in the regulations, sufficiently clear to Department staff and consistently communicated to fair housing organizations and members of the public.

Accept in part/Reject in part: This section has been deleted for clarity. Section 10050 of the proposed regulations has been revised to address comments regarding complainants' medical information and records gathered during the department's investigation. General practices of the Department regarding responding to Public Records Act requests and/or subpoenas, however, is beyond the scope of this rulemaking action, which is limited to the department's procedures for filing, investigating and conciliating complaints.

Comment G15: Section 10064—Notice of Case Closure: The commenter points out that, with regard to case closures, the notices provided parties sometimes reach inaccurate conclusions. The commenter notes, for example, that there is a difference between a finding that "no discrimination occurred" and a finding that there was "insufficient evidence that discrimination occurred." The commenter adds that although the unfavorable outcome of a department investigation does not preclude litigation, a poorly drafted notice of case closure can create problems for attorneys litigating such matters, and may impede complainants' ability to secure legal representation.

Reject: As no specific suggestion is made for revision of proposed regulation section 10064, no changes have been made to accommodate this comment. The commenters concerns have been noted, however, and are being addressed appropriately outside the rulemaking process.

COMMENTS RECEIVED DURING THE PERIOD THE MODIFIED TEXT WAS AVAILABLE TO THE PUBLIC

The modified text was made available to the public from December 1, 2010 through December 16, 2010. Three written comment letters were received during that period. Pursuant to Government Code section 11346.9(a)(3) and (a)(5), the DFEH has summarized and responded to those comments as follows:

Fair Employment and Housing Commission (FEHC) memo dated 12/16/10:

Comment A1: Section 10001(u)—Definition of Verified Complaint: The Commission states that proposed regulation section 10001(u) requires clarification and should conform to Code of Civil Procedure section 446.

Accept: Section 10001(u) has been revised for clarity to conform to the language of Code of Civil Procedure section 446, as the Commission suggests.

Comment A2: Sections 10012 and 10046—Director's Complaints: The Commission asserts that the Department's proposed procedural regulations have effectively conflated the criteria for "Director's complaints" with "class or group complaints," providing substantially similar criteria for each. The Commission says this is underscored in sections 10012(b) and 10046(b), which provide that Director's complaints may be filed, in the discretion of the Director, "on behalf and as a representative of a group or class of persons adversely affected, in a similar manner..." The Commission notes that the Legislature established a separate statutory basis for Director's complaints, distinct from class or group actions. (Gov. Code, §§ 12960(b) and 12961, respectively). The Commission adds that it is not clear in the proposed regulations how, when or why a Director's action differs from a class or group complaint. The Commission expresses concern that the current language of sections 10012 and 10046: (1) may lead to confusion regarding the appropriate criteria for Director's complaints; (2) lacks notification procedures to persons on whose behalf the Director is filing the complaint; and (3) given the conflation of the criteria, may lead to a lack of clarity concerning the applicable statute of limitations. (See Gov. Code, § 12965(a).) Of particular concern to the Commission is the existing proposed regulatory language in sections 10012(b) and 10046(b) ("on behalf of a representative of a group or class") which the Commission states may lead to unnecessary confusion between what constitutes a Director's complaint and a class or group complaint. The Commission submits that it would be helpful if the Department's proposed regulations shed guidance on the specific distinctions in the DFEH's procedures for Director's complaints.

Reject: No specific language has been suggested to revise the Department's proposed regulations governing Director's and class/group complaints. The Department declines to follow the Commission's suggestions regarding sections 10012 and 10046. Based upon its investigation and litigation experience, the Department requires flexibility in enforcing its statutory authority under the FEHA to issue director's complaints. Generally, the Department uses this authority to pursue broad injunctive relief in cases where a FEHA violation exists, but no real party has filed a DFEH complaint. The Department also uses this broad authority in conjunction with class cases. Specifically, during class litigation, the existence of a Director's complaint deters the common defense tactic of attempting to defeat the class complaint by settling with individual class complainants. While a defendant may attempt to settle directly with some individual class complainants,

the Department's litigation of the Director's complaint ensures that this tactic will not will defeat the entire class action. Accordingly, the proposed regulations can, and should, retain the Department's broad and flexible authority to investigate and litigate Director's complaints, both individually and in conjunction with class litigation. Limiting this important statutory authority through the regulatory process would be contrary to the public interest.

Comment A3: Sections 10013 and 10047—Class or Group Complaints: The Commission points out that the revised proposed regulations for class or group actions do not currently provide for the kinds of due process safeguards generally required in class actions. The Commission notes that Government Code section 12961 establishes that a “group or class case” is determined by the “judgment of the director [that] circumstances warrant.” The Commission recommends that the Department’s procedural regulations provide guidance on the following: (1) notice to potential class members of class or group action proceedings; (2) opportunity for potential class members to be heard and participate; (3) whether potential class members are to “opt in,” or “opt out” if they wish to exclude themselves from the proceedings; (4) notice of the binding effect of any settlement reached in a DFEH class or group action on potential class members who have or have not “opted in” or “opted out;” and (5) whether the DFEH can recoup costs of the class action procedures and investigation as part of any settlement reached. The Commission submits that the DFEH’s procedural regulations governing class actions should also address the recurring issue of balancing an employer’s or housing provider’s assertion of third party privacy interests of their employees and/or tenants and applicants, with the need for the DFEH to provide meaningful notice to potential class members during the investigative phase of a class or group complaint.

Reject: The Department declines to follow the Commission's suggestions regarding proposed regulation sections 10013 and 10047. While the Department appreciates the Commission's due process concerns, it is critically important to recognize that superior courts already adequately protect these interests. The Department’s recent \$6 million class action settlement with Verizon amply demonstrates this point. When the Department and Verizon finalized the class settlement, a joint motion was filed with the superior court in Los Angeles seeking preliminary court approval. In order to receive court approval, the proposed class settlement addressed all of the due process issues outlined in the Commission's comments. For example, the settlement outlined a notice procedure, an "opt out" process, and a method for filing objections to the class settlement. After careful review of the settlement, along with the agreement’s important due process protections for claimants, the superior court granted preliminary approval. The Department submits that superior court review and approval of class action settlements such as this amply demonstrates that superior courts in California already provide more than adequate due process protections for DFEH class claimants. There is no need for the Department’s regulations on class complaints to provide duplicative due process protections. Indeed, attempting such a regulatory effort would likely become counterproductive. The scope of

appropriate due process protections for class claimants will inevitably vary depending upon the unique facts of any individual class action. Attempting to "standardize" these due process protections in a regulatory framework would likely create protections that are either inadequate or overly burdensome when applied to specific class action settlements. In the Department's judgment, it is far more preferable for superior court judges to tailor the appropriate scope of process due protections when reviewing individual class settlements.

Comment A4: Sections 10017 and 10051—Effect of Prior Waiver

Agreement/Release of All Claims: The Commission notes that the DFEH has provided an analytical framework regarding the effect of waivers and prior settlement agreements on DFEH investigations, which includes factors such as the time allowed a complainant to sign a settlement agreement, opportunity to seek legal advice, and whether there was a "coercive" atmosphere. The Commission recommends adding as a factor to proposed sections 10017 and 10051 whether the waiver/release was presented in a language understood by the complainant and/or whether interpretative services were provided.

Accept: Proposed sections 10017 and 10051 have been revised for clarity to include the factors the Commission recommends.

Comment A5: Sections 10023, 10025, 10055, 10057, 10031 and 10063—

Mediation Provisions: The Commission makes several assertions regarding the sections of the proposed regulations pertaining to mediation, which are addressed separately below:

A5a: The Commission recommends that, in recognition of the FEHC's status as an independent adjudicatory agency, sections 10025(h) and 10055(h) of the proposed regulations be amended to replace "the department may **assign**" with "the department may **refer**...."

Accept: Sections 10025(h) and 10055(h) have been revised to clarify that the department may "refer" complaints to the FEHC for mediation (as opposed to "assign").

A5b: The Commission points out that the use of the phrase "automatic stay" in sections 10023 and 10055 of the proposed regulations may inadvertently infer that the DFEH investigation is "stayed" or tolled when a complaint is referred to mediation. The Commission also notes that sections 10025(b) and 10057(b) substantively duplicate the provisions of sections 10023 and 10055 regarding the effect of a mediation referral, but change the language from "automatic stay" to "the requirement to submit a response to the complaint is suspended." The Commission recommends revising these sections to provide specific guidance to the parties regarding the scope of the tolling effect of a mediation referral. An alternative the commentator suggests is to revise sections 10023 and 10055 to state that "***no response to the complaint is required while the complaint is pending in mediation.***"

Accept: Sections 10023 and 10055 of the proposed regulations have been revised for clarity but with different language than suggested by the Commission.

A5c: The Commission suggests that sections 10023, 10025(b), 10055 and 10057(b), which provide that, when mediation is declined or unsuccessful, a complaint response is due within 21-day days from “the date the complaint is returned to the enforcement division for investigation.” The Commission states that the appropriate trigger date is the date of notice to respondent, and suggests replacing the existing language with, “no later than twenty-one (days) **after the department notifies respondent that the mediation was declined or unsuccessful.**”

Accept: Sections 10023, 10025(b), 10055 and 10057(b), have been revised to clarify that the trigger date for the 21-day period within which a response must be submitted is the date the department notifies the respondent that a response is due because mediation was declined or was unsuccessful.

A5d: The Commission points out that since proposed regulation section 10055 provides that the initial time for a respondent to submit a response to a housing discrimination complaint is twenty (20) days after service of the complaint, extending the response period in section 10057 to twenty-one (21) days after mediation is declined or is unsuccessful seems illogical.

Reject: No specific suggestion is made for revision of section 10057. The response date for employment discrimination complaints is thirty (30) days (see proposed regulation section 10023) while the response date for housing discrimination complaints is 20 days (see section 10055) due to the fact that the amount of funding the DFEH receives per case from HUD decreases the longer a case remains open. Because referral of a complaint to mediation inevitably alters the timeline for response and investigation, regardless whether it is a housing or an employment discrimination complaint, the Department has decided for consistency to use the twenty-one (21) day response period for any complaint that does not settle in mediation.

A5e: The Commission notes that sections 10025(d) and 10057(d) provide that the DFEH attorney who “issued the accusation” shall attend the mediation, and recommends amending this subsection to add “**or who has subsequently been assigned to the case.**”

Accept: Sections 10025(d) and 10057(d) of the proposed regulations have been revised for clarity as the Commission suggests.

A5f: The Commission notes that sections 10025(i) and 10057(i) of the proposed regulations set out the confidentiality provisions governing the DFEH mediation process. Specifically, the draft regulations provide: “Everything that transpires at a mediation conference is confidential.” The Commission points out that the regulations then set out three exceptions to this confidentiality. The Commission notes that, as drafted, these regulations are confusing, as the exceptions appear to overwhelm the rule. The Commission further asserts that the listed exceptions do not provide for required departmental (and Commission) governmental reporting. The Commission states that a suggested change is to replace

“[e]verything that transpires at a mediation conference is” with “the mediation proceedings are...”

Accept: Sections 10025(i) and 10057(i) of the proposed regulations have been revised for clarity as the Commission suggests.

A5g: Section 10031(b) governing “Accusations,” adds the term “mediation” to existing language referencing “unsuccessful post-investigation conciliation.” However, the Commission notes that the analogous housing provision does not add the term “mediation.” (See § 10063(b).)

Accept: Section 10063(b) of the proposed regulations has been modified for clarity and consistency as the Commission suggests.

Comment A6: Section 10026—Complaint Investigation: The Commission notes that a minor typographical error appears at section 10026(a), requiring the addition of the word “of” to read, “to constitute a violation of the FEHA.”

Accept: Subsection (a) of the proposed regulation has been revised to correct this typographical error.

Comment A7: Additional Issue in Proposed Housing Procedural

Regulations: The Commission states that most of its comments regarding the revised proposed housing regulations have been addressed previously. The Commission notes one exception, in that section 10035 as drafted lacks a subsection (b). The Commission notes that the analogous provision in the employment subchapter, section 10009, contains a new subsection (b), providing for the omission of a complainant’s address and contact information in appropriate circumstances. The Commission notes that there appears to be no analogous provision in the housing subchapter, and recommends its inclusion at section 10035(b).

Accept: The text of the proposed regulations has been modified for clarity and consistency as suggested, but the revision has been made at section 100041(b), which is the housing regulation parallel to section 10009(b) of the regulations pertaining to employment discrimination complaints. (Section 10035 has been modified to correct a typographical error which resulted in the inadvertent omission of a subsection (b).)

Disability Rights California (DRC), et al., letter dated 12/16/10:

Comment B1: General—Reasonable Accommodation Policy: The commenter expresses disappointment that the Department did not include an explicit policy on reasonable accommodation as suggested by comments made on May 26, 2010. The commenter notes that, based on the discussion at the public hearing, it had been assumed that the Department was going to include such a policy in its modified text of its proposed regulations.

Reject: For the reasons explained in the Department’s response to preceding Comments E6 and F2, the Department has not included its policy for providing

equal access to members of the public with disabilities in its proposed procedural regulations.

Comment B2: General—Limited English Proficiency (LEP) Policy: The commenter expresses deep concern that the Department's proposed regulations have no provision regarding the accessibility of the complaint process for persons with Limited English Proficiency (LEP). The commenter asserts that this failure threatens to disfranchise millions of LEP Californians, many of whom are vulnerable seniors. The commenter requests that the Department adopt the suggestions for LEP provisions in its May 26 letter and create a readily available language access plan that assesses the needs of LEP persons and clearly states what the Department will do to meet those needs with regard to interpretation and translation.

Reject: For the reasons explained in the Department's response to preceding Comments E6 and F5, the Department has not included its policy for providing equal access to members of the public with limited English proficiency in its proposed procedural regulations.

Comment B3: General: Online Filing of Complaints: The commenter notes that multiple sections of the modified regulations reference online or electronically filed complaints, seemingly implying that a person can file a complaint online. The commenter asserts that it is unclear from the Department's Web site how a person can file a complaint online beyond those complaints that ask for an immediate right to sue in the employment context. The commenter highly recommends that the department modify its procedures so that complainants can electronically file each type of complaint where the department has jurisdiction.

Reject in part/accept in part: No suggestion is made to modify any of the Department's proposed regulations, thus, no revisions have been made to the text. A suggestion is made instead to modify the Department's procedures to enlarge the availability of online complaint filing, which is exactly what the Department intends. The Department has drafted its proposed regulations to accommodate the future availability of online filing for all complaints, without the need for the Department to amend its regulations.

Comment B4: Section 10001(j)—Definitions: The commenter notes that, beginning with section 10001(j), the Department changed the term "field offices" to "satellite offices" and adds that it is unclear whether there will be any difference in enforcement or procedures as a result of this change.

Reject: There will be no change in enforcement procedures as result of this changed terminology. Therefore, no changes have been made to accommodate this comment.

Comment B5: Section 10006—Filing a Complaint with the Department Alleging a Violation of the Unruh Civil Rights Act, Ralph Civil Rights Act, or Disabled Persons Act: The commenter notes that section 10006 uses the

language "also known as a public accommodations violation" to refer to violations of the Unruh Civil Rights Act (Civil Code, § 51). The commenter recommends that the Department remove the term "public accommodations" since the coverage of the Unruh Civil Rights Act applies to entities beyond those considered "public accommodations" under Title III of the Americans with Disabilities Act (ADA). The commenter notes that, for example, a "business establishment" owned and operated by a religious organization would be covered by the Unruh Act, but not considered a "public accommodation" under Title III of the ADA.

Accept in part/reject in part: Section 10006 has been revised for clarity to accommodate this request by changing "also known as a public accommodation violation" to "also known as **a denial of service** or public accommodation discrimination." [Emphasis added.]

Comment B6: Sections 10007(a) and 10038(a)—Intake: The commenter notes that sections 10007(a) and 10038(a) state that the Department will conduct an intake interview "where it appears that the department may have jurisdiction." The commenter states that presumably, the Department's intake staff will determine whether or not the department has jurisdiction from the face of something prepared by the complainant, who may not be able to articulate the issue. The commenter recommends that the Department conduct an intake interview each time a person indicates that he or she would like to file a complaint.

Reject: The Department receives numerous calls from persons who seek to file a complaint with the DFEH alleging matters that are outside the scope of the Department's jurisdiction (e.g., wage claims, meal and rest period violations, nondiscriminatory termination of employment, nondiscriminatory change in rental terms applicable to all tenants, etc.). The Department's name implies to some that the DFEH has jurisdiction over any employment or housing practice that the caller believes is "un**fair**." To do as the commenter suggests and conduct an intake interview each time a person indicates he or she would like to file a complaint would be grossly inefficient—and such a drain on the Department's scarce resources—that the DFEH would be precluded from fulfilling its mission to vindicate the rights of those victimized by unlawful discrimination.

Comment B7: Sections 10010 and 10042—Written Statement or Correspondence as Complaint: The commenter states that the expedited intake process and acceptance of a complaint in alternate format provided for under proposed sections 10010 and 10042 should be mandatory, rather than permissive. The commenter recommends that the first sentence of sections 10010(a) and 10042(a) be changed as follows (change in bold italics):

If the statute of limitations will expire before an intake interview can be scheduled and completed for a complaint filed for investigation, the department ***shall*** promptly initiate and conduct by phone, without an appointment, or waive the intake process

and accept a complaint for investigation using a written statement or correspondence from the complainant signed under penalty of perjury.

Reject: The Department has discretion to determine when intake can be completed before the statute of limitations runs as well as discretion to determine whether to accept a complaint for filing in an alternate format. The Department declines to limit its discretion by making these provisions mandatory.

Comment B8: Sections 10013 and 10047—Director's Complaints: The commenter notes that while addressing the option of a "group" complaint, these sections do not address the concern raised in the commenter's May 26, 2010 comment letter about the impact of a "class complaint" on unnamed class members. Specifically, it is not clear whether unnamed class members would be able to file their own complaints.

Reject: Unnamed class members are encouraged to file their own complaints. Please see the Department's response to preceding Comment F10.

Comment B9: Sections 10015 and 10050—Medical Information – Special Considerations: The commenter recommends that the Department add language to sections 10015(c) and 10050(c) that would provide notice to the complainant prior to the disclosure of any medical records or information pursuant to this section.

Reject: The Department declines to follow the commenter's recommendations. The Department has carefully considered the comments received during the 45-day public comment. In revising sections 10015 and 10050 to accommodate these comments, the Department has balanced the need to safeguard the privacy rights of complainants with the Department's statutory duty to investigate and prosecute complaints of discrimination. Sections 10015 and 10050 already provide that "[t]he department will abide by complainant's attorney's requests to protect the privacy of complainant's medical information." As such, no further revision is required.

Comment B10: Sections 10025(i)(3) and 10057(i)(3)—DFEH Mediation Division Services: The commenter states that the mediation process works best when items discussed at mediation remain confidential. The commenter adds that keeping settlement negotiations confidential is essential to producing open and frank settlement discussion, which is why Evidence Code §§ 1152(a) and 1154 protect "any conduct or statements made in negotiation" of a settlement. Thus, the commenter recommends the following as an alternative to sections 10025(i)(3) and 10057(i)(3):

If a respondent presents new facts at mediation that were previously unknown to the enforcement division, the respondent may be given the option of presenting such facts to the

enforcement division to help it consider whether to reevaluate the case.

Reject: Sections 10025(i)(3) and 10057(i)(3) refer to new facts presented by the respondent at a post-investigation, pre-accusation mediation—in which a representative of the DFEH Enforcement Division participates—that cause the department to re-evaluate the case and determine not to issue an accusation. The respondent is likely to communicate such facts directly to the Enforcement Division representative in a joint session, or to the mediator in caucus, with permission for the mediator to communicate the facts to the Enforcement Division representative who is present at the mediation. As such, the proposed revision is unnecessary.

Comment B11: Sections 10029 and 10061—Priority Case Processing/Case Grading System: The commenter notes that the modified language of sections 10029 and 10061 of the proposed regulations eliminates the automatic prioritizing of complaints raising "complex factual or legal issues." The commenter expressed concern that cases may be declined for investigation where complainants have difficulty articulating factual or legal issues, especially in light of concerns raised about the training of intake staff and the cursory reviews of initial complaints.

Reject: The Department declines to modify sections 10029 and 10061 as suggested. These sections govern the prioritizing of complaints *after* a complaint has been accepted for investigation. The Department routinely accepts and investigates cases involving complex factual and/or legal issues and will continue to do so. The Department also will continue to exercise its broad discretion to prioritize these cases where warranted, absent explicit language in the Department's proposed regulations authorizing as much.

Comment B12: Omitted Sections 10030 and 10062—Receipt of Confidential Information: The commenter states that while pleased that the Department has included sections on confidentiality of medical records, the commenter is disappointed that the Department failed to include a section protecting confidential non-medical information. The commenter notes that, for example, in a sexual harassment investigation, a complainant may have disclosed confidential non-medical information to the department (e.g., relationship history) that, under the proposed regulations with the modified text, does not have any confidentiality protections.

Reject: The Department declines to modify the text of its proposed regulations as suggested. Government Code section 12932(b) states that the Department "... shall hold confidential any information acquired in the regular performance of its duties upon the understanding that it would be so held." In addition, Evidence Code section 1040 permits the Department to acquire information in confidence, which the Department has a privilege to refuse to disclose if disclosure is against public interest. These safeguards—and this privilege—continue to exist despite the lack of explicit reference in the Department's regulations.

Comment B13: Section 10055—Response to Complaint: The commenter expresses concern about the statute of limitations running on complaints filed under the Unruh Civil Rights Act, the Ralph Civil Rights Act and the Disabled Persons Act while complaints are subjected to a stay pending mediation. The commenter recommends that the department include the following language in section 10055:

In situations where complaint investigations are filed under the Unruh Civil Rights Act, the Ralph Civil Rights Act or the Disabled Persons Act and are subject to a stay pending mediation, following a declined or unsuccessful mediation, the department shall conclude its investigation no later than thirty (30) days before the statute of limitations will run on the underlying claims.

Reject: The Department declines to modify section 10055 of its proposed regulations as recommended. The Department has, however, modified the text of the proposed regulations to clarify that the obligation to submit a response to a complaint is temporarily suspended when a complaint is referred to mediation; however, the Department's investigation is not stayed or tolled while a complaint is in mediation. Complainants should bear in mind, however, that while the Department already endeavors to complete investigations no later than 30 days before case expiration, the trigger date for case expiration is the date the complaint was filed with the Department, not the date of the alleged act of harm. Complainants who seek a Department investigation but intend to file a civil action if the Department finds insufficient evidence of an Unruh Civil Rights Act, Ralph Civil Rights Act or Disabled Persons Act violation are urged to file their complaint with the DFEH as soon possible after the alleged unlawful act and to keep careful track of their underlying statute of limitations.

The Legal Aid Society-Employment Law Center (LAS-ELC) letter dated 12/16/10:

Comment C1: Sections 10015 and 10030—Medical Information – Special Considerations: The commenter urges that the Department include in section 10015 a provision stating that, where medical information is requested, the Department will confer with the complainant (or, if applicable, her attorney) to draft a narrowly tailored medical release. Additionally, the commenter notes that section 10030 regarding the receipt of confidential information has been stricken in its entirety. The commenter states that this deletion leaves the regulations without procedures governing the receipt and handling of confidential information that is not medical (e.g., sensitive information relevant to a complaint of sexual harassment). The commenter states that it is unclear how, when, and for what reasons the Department would classify such information as confidential and

whether or how a complainant could request such a classification. The commenter urges the Department to make available to complainants a clear procedure for requesting that sensitive non-medical information be protected. The commenter further suggests that under the regulations, a complainant should have the opportunity to request that sensitive information be kept confidential after receipt by the DFEH, but prior to any disclosure to third parties. The commenter urges the Department to clarify its treatment of subpoenaed confidential information that is not medical.

Reject: The Department declines to follow the commenter's recommendations regarding revisions to modified text of the Department's proposed regulations. The Department carefully considered the comments received during the 45-day public comment. In revising section 10015 to accommodate these comments, the Department has balanced the need to safeguard the privacy rights of complainants with the Department's statutory duty to investigate and prosecute complaints of discrimination. Section 10015 already provides that "[t]he department will abide by complainant's attorney's requests to protect the privacy of complainant's medical information." As such, no further revision to this section is required. With regard to nonmedical information a complainant wishes the Department to hold confidential, Government Code section 12932(b) states that the Department "... shall hold confidential any information acquired in the regular performance of its duties upon the understanding that it would be so held." In addition, Evidence Code section 1040 permits the Department to acquire information in confidence, which the Department has a privilege to refuse to disclose if disclosure is against public interest. With regard to subpoenas, the same protections afforded to complainants when their records are subpoenaed from a private party apply when the Department is subpoenaed. These safeguards—and the aforementioned privilege—continue to exist despite the lack of explicit reference in the Department's regulations.

Comment C2: Accommodations for Complainants with Disabilities or Limited English Proficiency: The commenter notes disappointment that the regulations include no policies or procedures governing the accommodation of complainants with disabilities or who are limited in their English proficiency. The commenter states It is important that such provisions be codified in the regulations themselves, rather than relegated to separate "directive" documents which may be superseded or out of date. The commenter notes that regulations are published widely and cannot be amended substantively without a notice and comment period. The commenter asserts that it is thus far preferable for the Department's accommodation policies to be included in the regulations themselves.

Reject: No specific suggestion is made for revision of the Department's proposed procedural regulations to accommodate this comment. For the reasons explained in the Department response to preceding Comments E6, and F5, the Department's has not included its policy for providing equal access to members of the public limited English proficiency in its proposed procedural regulations.

ECONOMIC IMPACT ON SMALL BUSINESS

The proposed regulations impose no duties or obligations not already imposed by existing law. To the contrary, adoption of the proposed regulations is anticipated to benefit small and large businesses alike by clarifying the Department's procedure and making it easier for individuals and businesses named in complaints to participate in proceedings before the Department. The Department anticipates that the regulations should not impose any adverse impact—economic or otherwise—on small businesses. No commenter proposed an alternative to lessen any adverse economic impact on small businesses.